

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID TOMPKIN, et al.,
Plaintiffs,

vs. Civil Action No.
THE AMERICAN TOBACCO 5:94 CV 1302
COMPANY, et al.,
Defendants.

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Deposition of JOHN F. BURKE, JR., Ph.D.,
called for examination under the Applicable Rules
of Federal Civil Procedure, taken before me,
Wendy L. Klauss, a Notary Public in and for the
State of Ohio, pursuant to notice and
stipulations of counsel, at the offices of Baker
& Hostetler, 3200 National City Center,
Cleveland, Ohio, on Wednesday, August 15, 2001 at
9:25 o'clock a.m.

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1 APPEARANCES:

2
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Also Present:

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23
24
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1 - - - - -
2 (Thereupon, Burke Deposition
3 Exhibit 1 was marked for purposes of
4 identification.)
5 - - - - -

6 JOHN F. BURKE, JR., Ph.D., of
7 lawful age, called for examination, as provided
8 by the Ohio Rules of Civil Procedure, being by
9 me first duly sworn, as hereinafter certified,
10 deposed and said as follows:

11 EXAMINATION OF JOHN F. BURKE, JR., Ph.D.
12 BY MR. SEXTON:

13 Q. Would you please just state your
14 full name for the record.

15 A. Yes, sir. John F. Burke, Jr.

16 Q. And, Dr. Burke, you have been
17 retained by plaintiff in this case as an
18 economist?

19 A. Yes, sir.

20 Q. That is your profession and
21 training?

22 A. Yes, sir.

23 Q. I would like to show you what I
24 have had marked as Burke Exhibit 1, and I'll
25 provide a copy to your counsel as well. Dr.

7

1 Burke --

2 MR. SMITH: Terry, can I interrupt
3 you just one second. You are here on behalf of
4 Shook, Hardy & Bacon representing Philip Morris
5 and Lorillard?

6 MR. SEXTON: Yes.

7 MR. SMITH: Out of Kansas City,
8 right?

9 MR. SEXTON: That's right.

10 Q. Dr. Burke, I would like to ask if
11 you recognize Burke 1 as your May 18 expert
12 report in this case?

13 A. I do.

14 Q. And in that expert report, that May
15 18 expert report that's marked Burke 1, you
16 provide a market capitalization for the parent
17 companies of the defendant tobacco companies in
18 this lawsuit, correct?

19 A. Yes, sir.

20 Q. And I would like you to tell me how
21 it is that we do a market capitalization
22 calculation?

23 A. Yes, sir. Like many other things
24 in life, it depends upon the information that
25 is available. If the company has just been

8

1 bought and sold in an arm's length transaction
2 with free and willing buyers in an open market
3 with good information, you look at what they
4 paid for it. That would be the value of that
5 company.

6 Q. That's how we do a market

7 capitalization?
8 A. That is the market capitalization
9 of that company I just looked at. That's one
10 method.
11 Another method, if the company has
12 not been -- and there may be adjustments you
13 have to make to that first method, by the way.
14 For instance, if they wanted to buy a
15 controlling interest, they may have paid some
16 kind of premium for it.
17 But another approach, if it is a
18 publicly traded company and so the shares are
19 available on one of the many exchanges, you
20 just look at the point in time you want to
21 evaluate it, you look at the price of a share
22 that day, although as you know the price of a
23 share of stock may change for every minute that
24 the stock exchange is open, but you look at the
25 closing price of that day, and then you look at

9

1 the number of shares which are outstanding,
2 because also you know we are in a corporation,
3 it is shares of stock that show ownership.

4 So you look at the number of
5 ownership shares there are outstanding, you
6 multiply the numbers of shares times the price
7 of that stock, and that will give you the
8 market value of that company, it will give you
9 the capitalized value of that company, it will
10 give you the worth of that company, although
11 names are kind of synonyms.

12 There are other approaches. If it
13 is not a publicly traded company, there are
14 other approaches.

15 Q. I'm here today to ask you your
16 opinions about this May 18 expert report.

17 A. Yes, sir.

18 Q. And the market capitalization
19 calculation that you did in your May 18 report
20 that's marked Burke 1, in doing that
21 calculation, you multiplied the share price as
22 of May 18 times the number of outstanding
23 shares for each parent company to obtain the
24 market capitalization; is that correct?

25 A. Yes. With, as you can see, the

10

1 exception of Liggett.

2 Q. Thank you for that qualifier. For
3 Philip Morris, American Tobacco and Lorillard
4 Tobacco, you multiplied the share price times
5 the number of outstanding shares to reach
6 market capitalization?

7 A. I did.

8 Q. Your May 18 expert report provides
9 no information about the financial condition or
10 market capitalization of Liggett Tobacco?

11 A. Correct. Subsequent reports have
12 provided such information, but there is not
13 that information in the May 18 report.

14 Q. Okay. And you understand I'm here
15 today to ask you questions about your May 18
16 report?

17 A. I understand it because you just

18 said it, but I did not have an understanding of
19 that when I came here today. And I just showed
20 up, I didn't know what you were going to ask
21 me. I just presented myself here today.

22 Q. Fair enough. That is fair enough.
23 I'm here today to ask about your opinions up to
24 May 18 and your expert report that has been
25 marked Burke 1.

11

1 A. I will answer them to the best of
2 my ability.

3 Q. Thank you very much. Let's go back
4 to this market capitalization analysis for a
5 moment. Where did you obtain the information
6 about the share price and number of outstanding
7 shares in order to make your market
8 capitalization analysis for Philip Morris,
9 Lorillard and American Tobacco?

10 A. You can obtain that information
11 from a variety of sources. You can call up a
12 broker.

13 Q. I just want to know where you got
14 it?

15 A. I got it off the internet.

16 Q. And the internet site from which
17 you got the information to do your market
18 capitalization analysis that is contained in
19 your May 18 report, is that information that's
20 available to any member of the public?

21 A. Any member of the public with
22 access to a computer.

23 Q. Fair enough. Now, a common method,
24 perhaps the most common method by which
25 economists quantify the financial condition of

12

1 a company is called net worth; is that correct?

2 A. You say quantify?

3 Q. The financial condition of a
4 company.

5 A. It all depends on which kind of
6 financial condition you are talking about. If
7 you are talking about the financial condition
8 that involves capitalization, then we do what I
9 just said we do.

10 Q. If an economist or accountant is
11 interested in generally assessing the financial
12 condition or well being of a company, they
13 generally do a net worth analysis?

14 A. That would be one thing you would
15 look at, yes: What is the net worth of this
16 company.

17 Q. And could you provide us around the
18 table with sort of a working definition of net
19 worth?

20 A. Sure. It is a simple kind of
21 generality, a definition, and net worth is
22 equal to assets at a point in time minus
23 liabilities at the same point in time, and so
24 the economist likes to call that a snapshot at
25 this point in time. Not a day before and not a

13

1 day afterwards, but at this point in time your
2 assets, subtract your liabilities, all of them,

3 that's your net worth, company, person.
4 Q. So if I understand this, a
5 company's net worth takes into account both
6 their assets and their liabilities?
7 A. Yes. As I said, it is a snapshot,
8 so it looks at the beginning of time and sums
9 up all of their assets to this point in time,
10 looks at their liabilities from time zero and
11 adds them up at this point in time, and then
12 subtracts, and because it is a subtraction, net
13 worth can be positive, negative or zero.
14 Q. Just about any financial analysis
15 we want to do of a company is going to be a
16 snapshot of a particular moment in time?
17 A. No, sir.
18 Q. Certainly a market capitalization
19 analysis would be a snapshot?
20 A. Yes, it would be, but not any.
21 When you look at income statements, by
22 definition an income statement is a flow over a
23 period of time.
24 Q. So an income statement would be an
25 example of a more comprehensive analysis?

14

1 A. No, it wouldn't be more
2 comprehensive. It is just another look. One
3 is a stock concept at this point in time, the
4 other is a flow.
5 So you may look at the balance
6 sheet of a company at, say, the end of the
7 first quarter, March 31 of some particular
8 year, and you may calculate its net worth.
9 You may also look at the first
10 quarter income statement, which is going to
11 give you a flow over the three-month period
12 involved in the first quarter, tell you how
13 much came in, how much went out. That's a flow
14 concept.
15 Q. Is a net worth analysis an accurate
16 method for projecting a company's stability to
17 pay a debt?
18 A. It is one of the things, but you
19 can't look at these things in isolation. It is
20 one of the things that you should look at, but
21 I wouldn't look at it in isolation.
22 Q. What else would you want to look at
23 if you want to know a company's ability to pay
24 a debt beyond net worth?
25 A. I would look at their income

15

1 statements.
2 Q. And just for the benefit of the
3 non-economists in the room, including myself,
4 could you give us a definition of income
5 statements?
6 A. Yes. I defined it just a moment
7 ago. That would be looking, for example, at
8 the first quarter or two quarters or three
9 quarters or a year or a ten-year period. It is
10 a look at the flow, the flow of money that
11 comes into this company and the flow of money
12 that goes out of this company, which the net
13 result of which in some definition is profit.

14 So you not only want to look at how
15 much the company is worth at a point in time,
16 you also want to look at how much revenue it
17 generates and how much expenses it creates and
18 how much profit it generates over a period of
19 time. That's a flow concept. And that's
20 another piece of information you would want to
21 look at, but again there are others.

22 Q. What other pieces of information
23 would you like to look at in assessing the
24 financial health or condition of the company
25 beyond income statements and net worth?

16

1 A. If I'm looking at it at a point in
2 time, I mean the figures that I gave you on May
3 18 in the 2001 report, that is the figure at
4 that point in time for what that market
5 capitalization is worth.

6 But if I wanted to make a more
7 detailed analysis of this company, I would look
8 at the income statements, I would then if
9 possible try to find out -- make a forecast of
10 what the future held for this company.

11 Q. If you as a professional economist
12 wanted to answer the question what is the net
13 worth of Philip Morris, Inc., what documents
14 would you want to look at?

15 A. Balance sheet.

16 Q. And could you just give me a fuller
17 description of what you mean by balance sheet?

18 A. Yes, sir. Balance sheet is a stock
19 concept, it is information collected at a point
20 in time, not over a point in time, but at this
21 point in time, whatever that point in time is,
22 and it measures the book value of the assets of
23 this company and the liabilities of this
24 company, and the difference between those two,
25 as we talked about this morning, is net worth.

17

1 If you want to figure the net worth
2 of a company, you look at documents that will
3 tell you the net worth, and that document is a
4 balance sheet.

5 Q. Have you been given the opportunity
6 in this case to look at the balance sheet for
7 any of the defendant tobacco companies?

8 A. On the information I found on the
9 internet, yes, sir. I didn't concentrate on
10 it.

11 Q. You have had the opportunity to
12 look --

13 A. At the information that was
14 available on the internet, yes, sir. But I
15 didn't spend a lot of time on that.

16 Q. I'm not sure I understand. Is it
17 your testimony here today that the balance
18 sheets for Philip Morris, American Tobacco and
19 Lorillard Tobacco are available on the
20 internet?

21 A. I believe it is for Philip Morris.
22 I don't think it is for Liggett, I don't think
23 it is for American Tobacco.

24 Q. What about Lorillard?

25 A. I don't recall about Lorillard, but

18

1 I think it is available for Philip Morris.

2 This is the parent, we are talking
3 about the parent, the big guy, that's a
4 publicly traded company. That information is
5 available publicly. If it isn't on the
6 internet, you can find it in the library, you
7 call your broker, you get on the line and you
8 call Philip Morris and say would you send me
9 your annual report. They are usually happy to
10 do that.

11 Q. I understand all that information
12 is available. I'm interested in what balance
13 sheets you looked at in this case for these
14 defendants, and you believe that you may have
15 looked at the Philip Morris balance sheet, but
16 not for the others?

17 A. Glanced at it. I didn't spend a
18 lot of time doing that, because I was
19 interested in another aspect of the company.

20 Q. So you wouldn't say that you did a
21 thorough analysis of the Philip Morris balance
22 sheet?

23 A. I would not say that at all, no,
24 sir. And I don't think I reference that in my
25 report here that we are talking about today.

19

1 Q. Great. Thank you. In assessing
2 the financial condition of the defendants in
3 this case, would you like an opportunity to
4 look at their balance sheets?

5 A. It all depends on what question I'm
6 asked. If I'm asked for the market
7 capitalization, I only need the data that I
8 already had. I need two pieces of information:
9 Stock price and number of shares.

10 If that's the only question I'm
11 being asked, I don't have to look at anything
12 else. The public has done that job. They told
13 me what they think the stock is worth, the
14 company will tell me how many shares are
15 outstanding. If that's my assignment, I don't
16 have to look at anything else. If your
17 assignment is different or bigger, then I may
18 have to look at other things.

19 Q. If someone at trial were to ask you
20 about the financial condition of the defendants
21 in this case, would you like an opportunity to
22 look at the balance sheets in order to answer
23 that question?

24 A. Yes, sir.

25 Q. If a corporation like Lorillard

20

1 Tobacco or Philip Morris goes to a bank and
2 wants to get a loan, is the bank going to ask
3 to see the balance sheet?

4 A. I'm not a banker, but if I were a
5 banker, I would ask for that if I didn't
6 already have it in my files, because again for
7 Philip Morris, publicly traded corporation,
8 they probably have that information.

9 Q. Looking back at Burke 1, the May 18

10 expert report you prepared in this case, is it
11 fair to say that a market capitalization
12 analysis can only be done for -- strike that.

13 Looking at Burke 1, which is your
14 May 18 expert report, it is only appropriate
15 for us to speak of market capitalization for a
16 publicly traded company; is that true?

17 A. No.

18 Q. We can do a market capitalization
19 for a company that is not publicly traded?

20 A. Yes, sir.

21 Q. And you may have already told me
22 how to do this, but would you explain to me one
23 more time how we do a market capitalization of
24 a nonpublicly traded company?

25 A. It is easiest if it is a publicly

21

1 traded company, but if it is not a publicly
2 traded corporation, you can figure out the
3 market value, market capitalization value of
4 that company in a variety of different ways.

5 Q. For a company that's not --

6 MR. SMITH: Excuse me one second.

7 I would like the witness to be permitted to
8 finish his answer.

9 Q. I didn't mean to interrupt you.

10 A. I was done. Thank you.

11 Q. If at any point during today I do
12 interrupt you, tell me you want to finish your
13 answer and I would let you.

14 A. I had shut my mouth, which is a
15 rarity, by the way.

16 Q. For a publicly traded company, if
17 we want to do a market capitalization of a
18 publicly traded company, we multiple share
19 price times outstanding shares?

20 A. Yes. The market has done all our
21 work for us.

22 Q. For a nonpublicly traded company,
23 we want to look at something else, and what is
24 that something else?

25 A. It all depends on what data you

22

1 have available, because there are millions,
2 maybe billions of nonpublicly traded companies.

3 Every mom and pop discount store,
4 if it is a corporation, you can figure out the
5 capitalized value of that, and the capitalized
6 value is what would this entity sell for in an
7 arm's length transaction, willing buyer,
8 willing seller, good knowledge on both sides of
9 the marketplace, you can figure that out.

10 Q. If you were going to do a market
11 capitalization on a nonpublicly traded company,
12 could you give me some examples of what you
13 would want to look at?

14 A. Again it is going to vary on the
15 circumstances, so if this is a type of entity
16 which is well known and there are lots and lots
17 of them and they are all very similar, such as
18 a McDonald's franchise, you would go out and
19 look at what other McDonald's franchises have
20 sold for. If you can find one in similar

21 circumstances to the one you are looking at,
22 then you say the capitalized value of this
23 franchise, what the sales price of it would be
24 would be very similar to all those other ones
25 that have sold. That would be one method,

23

1 especially if you can find a recent sale in a
2 very similar set of circumstances. That would
3 be a good method -- a method.

4 Another method would be if you
5 can't find the identical, so if we are looking
6 at selling a machine shop, a screw machine
7 shop, you may look around and find 20 other
8 screw machine shops and find out what they have
9 sold for and make some adjustments for perhaps
10 averaging, it is big and it is little, where
11 does your guy fit in, and look at comparables,
12 similar to what happens when you are pricing a
13 house that you are going to sell.

14 If there are not comparable sales,
15 then you may look at the net income, the net
16 profit of this company over a period or at a
17 point in time and make a judgment on where this
18 company fits on a risk spectrum and come up
19 with a capitalized value that way.

20 So if this company has net \$1,000
21 and you assess the discount rate,
22 capitalization rate to be applied at 20
23 percent, you would say in the open market, if
24 there were a sale, reasonable people would be
25 willing to pay \$5,000 for that company.

24

1 That's a price earnings ratio. So
2 you can also look at price earnings ratios for
3 the typical company. You may go to Standard &
4 Poor's and say, what's the typical of all of
5 the companies, 500 companies that are in the
6 S&P, what is the average price earnings ratio
7 there, you may do some statistical analysis to
8 come up with standard deviations and estimated
9 value of the mean, and say, okay, if this turns
10 out to be 20, we will take the earnings of our
11 company and multiply it by 20 to get that price
12 earnings ratio.

13 Another method may be there may be
14 experts in the field who you go out and ask 20
15 experts, say what is this company worth, they
16 know.

17 Other industries may have thumb
18 rules, like companies in this industry sell for
19 one times annual sales or one and a half times
20 annual sales or one times annual sales minus
21 accounts payable. There may be a thumb rule.
22 So there is lots of different methods, and all
23 of them you can look at before tax or post tax
24 or variations on the theme.

25 But it is very -- the methodology

25

1 to value the capitalized value of companies
2 that are nonpublicly traded is very well known
3 amongst economists. Getting the data and
4 putting it together may be difficult, but the
5 methodology is very well known amongst

6 economists and published in a lot of books.

7 Q. Your May 18, 2001 expert report
8 provides a market capitalization analysis for
9 the parent companies of the defendant tobacco
10 companies in this case?

11 A. Yes, sir. As I understand it, and
12 I'm not a lawyer, but as I understand it, I
13 think the people that are being sued are not
14 the parent companies, they are subsidiaries.

15 Q. In fact, if we look at the chart on
16 the May 18 report, we see that a tobacco
17 company that is the defendant in this case is
18 Philip Morris, Inc. The market capitalization
19 analysis was done on Philip Morris Companies,
20 Inc., correct?

21 A. Yes, sir.

22 Q. The same would be true for American
23 Tobacco, the market capitalization analysis was
24 actually done on British American Tobacco?

25 A. Yes, sir.

26

1 Q. And the same would be true of
2 Lorillard, the market capitalization analysis
3 that you did in your May 18 report was done on
4 Loews Corporation?

5 A. Yes, sir.

6 Q. It is your understanding, isn't it,
7 that Lorillard Tobacco Company is not a
8 publicly traded company?

9 A. Lorillard?

10 Q. Lorillard.

11 A. Yes, Lorillard, Loews Corporation
12 is.

13 Q. Lorillard Corporation is not a
14 publicly traded company?

15 A. Yes, it is a subsidiary.

16 Q. It is a separate corporation?

17 A. It is a separate corporation, but I
18 believe it is a subsidiary of another company.
19 Although it is a separate corporation, but the
20 stock in that corporation is owned by another
21 company.

22 Q. But Lorillard Tobacco Company
23 itself is not a publicly traded company?

24 A. I thought I answered that one.
25 Yes. I guess I wasn't specific. Yes.

27

1 Q. Philip Morris, Incorporated is not
2 a publicly traded company?

3 A. Correct. It says, Inc., so it is a
4 corporation, that means there are shares out
5 there, but they are owned by an entity that
6 chooses not to trade them.

7 Q. American Tobacco Company is not a
8 publicly traded corporation either?

9 A. Correct.

10 Q. Nor is Liggett?

11 A. Correct.

12 Q. And when we look at the market
13 capitalization of a publicly traded company, we
14 have to be aware, don't we, that market
15 capitalization can vary a great deal over a
16 very short period of time?

17 A. Sure.
18 Q. And, in fact, market capitalization
19 of a publicly traded company can vary based on
20 things that have nothing to do with the
21 company?
22 A. If it looks like peace is going to
23 break out, the stock market goes to hell. One
24 of the worst things that can happen to the
25 stock market is the peace scale, and all stocks

28

1 plummet. Or if Alan Greenspan sneezes.
2 Q. That can affect market
3 capitalization as well?
4 A. It can affect market capitalization
5 at that point in time, not in the long run, but
6 in the short run those things can affect it.
7 The economists call those shocks.
8 Q. So market capitalization can be
9 very volatile over time?
10 A. It can be, and within very short
11 periods of time, because if you call up your
12 broker every hour today and ask for a quote on
13 some particular stock, if it is an active
14 stock, the price will probably be different
15 every time you make the call.
16 Q. A market capitalization reflects a
17 subjective valuation of the company made by
18 investors?
19 Perhaps I can make the question
20 more clear.
21 A. I would call that objective. I
22 wouldn't call that subjective. Now, if a
23 million shares are traded today and each person
24 bought one share, then millions of people may
25 have made their own subjective evaluation of

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1 what is going on and that's why they chose to
2 buy, and a million other people made their
3 subjective evaluation and that's why they chose
4 to sell.
5 But under capitalism, the
6 marketplace is objective. It may be made up of
7 millions and millions of subjective buyers and
8 subjective sellers, but under capitalism, the
9 market is an objective place. If the price is
10 20, it doesn't care if you are black or white,
11 male or female, young or old, it is objective.
12 Q. But in terms of investors deciding
13 what the stock of a particular company is
14 worth, often times that involves the subjective
15 evaluation of the company by each individual
16 investor?
17 A. I would say what you have expressed
18 is a tautology, and you are right, but every
19 price of everything that has ever existed is
20 subject to that same -- you paid some money for
21 that suit, you made a subjective analysis of
22 how much that suit was worth to you, you
23 decided to buy it. Same is true of the tie,
24 same is true of the watch, same is true of the
25 glasses, because you are a subjective

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1 individual, every price, so it is a tautology

2 to say that it is made up -- I agree with you
3 completely, but every price in the world that
4 has ever existed is subject to those same
5 subjective things.

6 I like this tie. Other people say,
7 God, how could you ever wear a tie like that,
8 what kind of a klutz would. But it is a
9 subjective thing, your tie, your tie, your tie,
10 they are all made up of those subjective things
11 which, by the way, economists can't measure. I
12 can measure how much you paid for it, but I
13 can't measure the subjective reasons of why you
14 hated your great grandmother that caused you to
15 buy that tie, and I can't measure those things.

16 Every tie is subjective. The
17 market is objective.

18 Q. Market capitalization changes when
19 the stock prices changes?

20 A. Absolutely. Yes, sir.

21 Q. The market capitalization contained
22 in your May 18 expert report is, as you
23 mentioned before, a snapshot in time?

24 A. Yes, sir. If you looked at it at a
25 different point in time, you would get a

1 different answer.

2 Q. For example, the market
3 capitalization for the three companies for
4 which you provide a market capitalization in
5 your May 18 report is different today than it
6 was on May 18?

7 A. Yes, sir.

8 Q. And, in fact, I took the liberty of
9 looking at the internet to see what Philip
10 Morris Companies closed at on Monday and saw
11 that it closed at 44.27 a share. Doing my own
12 rough math based on the calculation you
13 provided us, I see that that would be a drop in
14 market capitalization of approximately --

15 A. 14 percent.

16 Q. Or \$16,871,377,327 roughly.

17 A. Easy come, easy go.

18 Q. Now, it would not be your position,
19 would it, that the financial condition of
20 Philip Morris Companies, the parent company,
21 has changed that dramatically in the last 90
22 days, would it?

23 A. I don't have a position on that. I
24 would like the opportunity to go and
25 investigate that to see if it has.

1 Q. What would you look at in order to
2 investigate whether the financial condition of
3 Philip Morris Companies has changed that
4 dramatically over 90 days?

5 A. First of all, I would go trace the
6 stock price over the 90 days, make a graph,
7 show what happened to it. I would look and see
8 from Philip Morris themselves if there have
9 been any pronouncements from the company that
10 are going to dramatically affect the price of
11 their stock. I would call a variety of brokers
12 and ask them what their opinion is on the

13 change in the price of the stock.
14 I would also compare the price of
15 the stock to the general drift of the stock
16 market, if the stock market has also come down
17 by 14 percent during the same time period, and
18 I would say it is just general downward drift
19 of all prices and nothing has happened
20 separately to Philip Morris to cause this to
21 change, it is just the general market decided
22 to reevaluate its position and perhaps change
23 the PE ratio.
24 On the other hand, there may be
25 some piece of news that is going to impact that

33

1 price, but you would have to try to figure out
2 what that is.
3 Q. For the parent companies that are
4 listed in your May 18 expert report which is
5 marked as Burke 1, can you tell us who owns the
6 majority of the shares for each of those public
7 companies?
8 A. No.
9 Q. It is fair to say though --
10 A. You mean outside of the parent?
11 Q. I'm referring now to the parent
12 companies.
13 A. Who owns those, I do not know, and
14 I believe that if you own 5 percent or more of
15 a publicly traded corporation, that has to be
16 listed with the SEC.
17 So we could probably find out if
18 there are any individuals or groups of entities
19 or businesses that own 5 percent or more, we
20 could find that out, but the individual names
21 of the people who might own a share or two or
22 ten, Philip Morris knows that, because they are
23 obliged to send out proxy statements to all of
24 their owners.
25 So the best place to go would be to

34

1 ask Philip Morris, Inc. to give you a list, and
2 by the way, they would give you a list at a
3 point in time too. They wouldn't know who
4 traded yesterday.
5 Q. You said Philip Morris, Inc., but
6 you meant Companies Inc.?
7 A. I did, I meant the parent. They
8 would have a list.
9 Q. Sure. My question though is --
10 A. But I'm not privy to that list.
11 Q. Fair enough.
12 A. I guess I could buy a share of
13 Philip Morris Companies, Inc., go to the
14 stockholders meeting and demand to see that
15 list, and as an owner of that company, I think
16 I would be entitled to see that.
17 Q. Probably.
18 A. Especially if I wanted to raise a
19 proxy fight against them and I needed that list
20 in order to send out whatever my issue would
21 be. So I could probably get ahold of that
22 information.
23 Q. Focusing now on the parent

24 corporation, the publicly traded corporation,
25 it would be fair to say, wouldn't it, that

35

1 Philip Morris Companies, Inc. itself does not
2 own all of its own stock?

3 A. Right.

4 Q. The same would be true for the
5 other publicly traded corporations listed on
6 the May 18 report?

7 A. Automation has come a long way and
8 big brother is out there, but we haven't yet
9 got to the point where companies are owned by
10 companies without involving people.

11 Q. Right.

12 A. Ultimately all stock, all property
13 is owned by a person.

14 Q. I'm probably making this more
15 complicated than I need to. My point is simply
16 that thousands of individuals and institutional
17 investors own the stock in Philip Morris
18 Companies, Inc.?

19 A. I don't know that for a fact, but I
20 would assume that. I would assume it might be
21 even millions of owners.

22 Q. And the same would be true for the
23 other publicly traded corporations?

24 A. Yes, sir. But you can get that
25 list. The company has that list. They know

36

1 who owns their stock at a point in time.

2 Q. Absolutely. But the company
3 doesn't control the shares that are held by
4 those thousands or millions of individuals and
5 institutional investors?

6 A. In what sense? Are the people free
7 to buy and sell them?

8 Q. Yes.

9 A. Yes, they are.

10 Q. The publicly traded companies that
11 are listed on your May 18 report cannot tell
12 individual and institutional investors when to
13 buy and sell stock or for what price they have
14 to buy or sell it, for example?

15 A. In general, no. Sometimes there
16 are restrictions. I may buy you out and I buy
17 out you with stock, and I say there is a
18 two-year restriction before you can sell that
19 stock. So in that sense, I can control your
20 destiny for those two years, but in general,
21 you call up your broker and you buy a share of
22 stock in the company and you can hold onto it
23 for an hour or day or week or whatever, sell it
24 whenever you want to in a capitalistic society.

25 Q. For example, Philip Morris

37

1 Companies, Inc. could not force the thousands
2 or millions of individual and institutional
3 investors that own its stock to sell their
4 stock upon its command and then seize the
5 proceeds of that stock to pay off its debts,
6 for example?

7 A. I don't consider myself to be a
8 stock exchange lawyer.

9 Q. Sure.
10 A. I am familiar with bonds that have
11 a recall, but I'm not familiar with stock that
12 has a recall, with the exception of what I
13 mentioned a few minutes ago, so I don't think
14 that the parent company could -- they could
15 make it uncomfortable for you, but I don't
16 think they could force you to sell it. They
17 could make it uncomfortable, because there are
18 times when companies have called in their
19 shares.
20 Q. Right.
21 A. I own shares of stock in -- three
22 or four shares of stock in companies that were
23 called in 20 years ago, and it wasn't worth the
24 20 cents to me, so I kept the shares just for
25 old times sake. It wasn't worth putting on a

38

1 stamp and sending it in because the company
2 went belly up and the company said, "Send the
3 shares in."
4 So it does happen, but in general,
5 no, companies don't do that, and whoever owns
6 the stock is the one who gets the proceeds of
7 the sale.
8 Q. You are familiar generally with the
9 recent media hype that's been going on with the
10 demise of some of these internet companies, the
11 so-called dot com collapse?
12 A. Sure. In general, from what I read
13 in the newspaper.
14 Q. Right. And would it be fair to say
15 with respect to these, speaking generally about
16 these internet companies, that often times they
17 have enormous market capitalization?
18 A. Enormous.
19 Q. Enormous market capitalization that
20 in many instances far exceeded their actual
21 financial worth?
22 A. Irrational exuberance.
23 Q. Could you just tell us what that
24 means?
25 A. Yes. I heard it from Alan

39

1 Greenspan. He said that he thought a lot of
2 the high stock prices were the result of
3 irrational exuberance.
4 Q. So market capitalization does not
5 always reflect the actual financial worth of
6 the companies?
7 A. No, it does. It does. If you had
8 sold your shares in that dot com company in
9 that point in time, you would have gotten 28
10 billion. A year later, it may be only worth
11 \$10, but both of them are reflections of what
12 that company is worth at that point in time.
13 Had you sold at that point in time, that is
14 what you would have gotten.
15 So market capitalization is a very
16 good indicator at that point in time of what a
17 company is worth. But as we have already
18 discussed today, it can change.
19 Q. And market capitalization reflects

20 what the individual investors could get had
21 they sold their stock at that particular moment
22 in time?

23 A. Whoever owns the property is the
24 one, all things being equal, who is going to
25 get it, unless they are in the middle of a

40

1 divorce, then it is 50 percent.

2 Q. Market capitalization does not
3 necessarily reflect the actual assets held by
4 the company?

5 A. The market capitalization is not a
6 reflection, a mirror image of the assets.
7 There is a relationship to the assets, but
8 market capitalization is what somebody is
9 willing to buy and sell this company for, not
10 what they are willing to buy and sell the
11 assets for.

12 Q. Often times as in the case of the
13 internet companies, the relationship between
14 those companies' market capitalization and
15 their actual assets can become distended or
16 distorted?

17 A. Not just the internet companies.

18 Q. Sure. This would be true for any
19 company?

20 A. Any company. There are some
21 companies which are very heavy in assets, like
22 a steel mill, and there are some companies
23 which are very low in assets, like a law firm
24 or an economic consulting firm. I mean you
25 have a few books, a couple of tables, that's

41

1 not what generates your wealth.

2 So there is a connection, but it is
3 a loose connection.

4 Q. Market capitalization is not always
5 a fair reflection of the financial resources
6 available to that company?

7 A. Market capitalization is what it
8 is. It is the value of the company. If you
9 had all the stock and sold it, that's what it
10 would be, but I prefer to state it the other
11 way. I think market capitalization is a very
12 good indicator of the finances of that company,
13 whereas assets or net worth is a poorer
14 indicator of what the value of that company is.

15 Q. Sure. But in terms of evaluating
16 the financial resources that a company has
17 available to it, market capitalization is not
18 the best reflection of that figure?

19 A. Of the resources that a company has
20 available to it, market capitalization is a
21 different concept. That is not a measure of
22 how much the company has available to it, it is
23 a measure of how much the company is worth. So
24 there are different things, so of course
25 different things are different.

42

1 Q. And in the case of these internet
2 companies they have been generally referring
3 to, market capitalization often exceeded the
4 actual value of the assets the companies had

5 available to them?

6 A. I haven't studied all companies,
7 but I would think except for a company that is
8 in bankruptcy and going down the toilet, in all
9 the other companies, market capitalization
10 would exceed the value of the assets. That
11 would be true for every law firm, true for
12 other economics consultant, every court
13 reporter firm.

14 Q. That would be true for the publicly
15 traded companies listed on the report?

16 A. Absolutely. The market
17 capitalization would be greater than the value
18 of their assets.

19 Q. And by definition then, market
20 capitalization would exceed the net worth for
21 those companies listed on your May 18 report?

22 A. As a generalization, yes, sir. I
23 would state it the other way: If your market
24 capitalization is less than your book value,
25 you are in trouble.

43

1 Q. If you were advising in your
2 professional capacity an investor or a company
3 that wanted to buy Philip Morris, Inc., the
4 subsidiary tobacco company of Philip Morris
5 Companies, Inc., would you advise that client
6 to pay a value equal to the market
7 capitalization of the parent company?

8 A. First of all, I don't give that
9 kind of advice. I do not give stock advice,
10 with one exception. There is only a couple of
11 times in my life I have figured out a good
12 investment. I figured out one recently, and
13 that is I would say to you now in around 2008,
14 I would invest in ventilators given that in
15 2011, the inheritance tax is going to go to
16 zero. Nobody is going to die in 2008, 2009,
17 2010. We are going to keep them alive until
18 2011. But I don't hold myself out as anybody
19 that gives stock market advice.

20 However, if your question is should
21 somebody pay the market price for that share of
22 stock, the answer is yes.

23 Q. I'm asking a more precise question.
24 I'm asking if an investor comes to you and says
25 I want to buy the subsidiary corporation Philip

44

1 Morris, Inc., would you recommend or advise
2 that person to pay a price equal to the market
3 capitalization of the parent company?

4 A. Is that the only information I
5 have?

6 Q. Yes.

7 A. I have no other knowledge about
8 this situation?

9 Q. That's right.

10 A. Then I would tell them no.

11 Q. Okay.

12 A. I would say seek more information,
13 you do not have enough information to make an
14 intelligent decision about the subsidiary. You
15 have enough information to make an intelligent

16 decision about the parent, but not about the
17 subsidiary.
18 Q. If one of these tobacco companies
19 listed on your May 18 expert report came to you
20 and you were a banker and they wanted a loan
21 and you wanted to assess their financial
22 condition deciding whether you are going to
23 make the loan to them, you would want to look
24 at something beyond market capitalization,
25 wouldn't you?

45

1 A. Sure. You already asked me that
2 before and I said yes.
3 Q. I'm sorry for repeating myself.
4 A. Not a problem. I'm happy to answer
5 all your questions.
6 I would look at their balance
7 sheet, income statements, market forecast, I
8 would look at a lot of information. I would
9 also look at what they are willing to sign off
10 on, what kind of collateral do they have, and
11 their collateral would be their net worth and
12 the size of the loan.
13 If Philip Morris comes in and says
14 I need 100 bucks until tomorrow, I would lend
15 them that without doing anything. But if they
16 need 100 billion, I would want to look at
17 something.
18 Q. You were talking to me earlier
19 about balance sheets. Is that the same thing
20 as an audited financial statement?
21 A. A balance sheet may be an audited
22 financial statement, a balance sheet may not be
23 audited. An audit process is you hire a
24 competent, qualified CPA to come in and look
25 over all of these books, both the balance

46

1 sheet, the income statement and the other
2 financial records that you have and put their
3 imprimatur on it, put their seal of approval,
4 that's what audited is.
5 So accounting statements may or may
6 not be audited. Audited are better than
7 nonaudited.
8 Q. Audited financial statements
9 provide more accurate and complete information
10 than unaudited financial statements?
11 A. Yes. That doesn't mean they can't
12 be wrong. The auditor could have made a
13 mistake, could have been bought off, not given
14 sufficient information, but in general an
15 audited statement where the Pope has put his
16 imprimatur on this document is better than the
17 one where the Pope didn't put his imprimatur.
18 Q. If somebody came to you and wanted
19 your professional opinion about the financial
20 condition of a company, you would be interested
21 in looking at their audited financial
22 statements if they were available to you?
23 A. If they were available, but I would
24 also look at other statements, because I
25 believe there is a line down near the bottom of

47

1 tax returns that say this is signed under
2 penalty of perjury. I know I take that
3 seriously when I send in my 1040, so I take
4 that statement seriously.

5 If you send me a tax return, maybe
6 you have cheated on it, but I take it on its
7 face it is a good return. It would be better
8 if I had the audited, but a tax return is a
9 good document to look at.

10 Q. So if you as a professional
11 economist are looking at the financial
12 condition of a company, an audited financial
13 statement would be one important piece of
14 information that you might want to look at in
15 deciding how that company is doing financially?

16 A. Yes, sir.

17 Q. Are you familiar with how the
18 business or financial communities use audited
19 financial statements?

20 A. I'm not an accountant, I don't hold
21 myself out as an accountant, so I think I would
22 answer that question no, except in very general
23 terms.

24 Q. Do you know whether, for example,
25 banks or investors or creditors look at audited

48

1 financial statements in making financial
2 decisions with respect to the companies like
3 the defendants in this case?

4 A. I would say that the overwhelming
5 majority of investors do not do that.

6 Q. What about banks or creditors?

7 A. They may. I think the bank
8 especially would be well advised to do that. I
9 don't know if there is a -- I don't know what
10 law covers banks, but I don't know if in that
11 law it says you have got to look at this. But
12 loans go bad for one reason, and that's bad
13 management, and bad management typically hasn't
14 looked at those kind of documents.

15 So I would advise them to look at
16 those kind of documents, but most investors --
17 most investors have their broker call up and
18 say, hey, John, I think you should buy this
19 one.

20 Q. Sure. Fair enough.

21 A. And seldom -- sometimes I say send
22 me some papers on it, but seldom do I get
23 audited financial statements when I ask for
24 those. I get some little market survey where
25 their research department has said,

49

1 "Recommendation by."

2 Q. Fair enough. Have you had the
3 opportunity to review audited financial
4 statements for any of the tobacco company
5 defendants in this case?

6 A. No, sir.

7 Q. Would it be useful for you to
8 review the audited financial statements for
9 these companies in trying to decide the
10 financial condition of those companies?

11 A. In the document that you labeled

12 Burke 1, no.
13 Q. Okay. Let's go back to that. You
14 raise an interesting point. The May 18, 2001
15 expert report which is labeled Burke 1, as you
16 have already pointed out to us, provides a
17 market capitalization for the parent companies
18 of the tobacco company defendants in this case?
19 A. Yes, sir, that's what it says.
20 Q. You are not holding that market
21 capitalization in and of itself as a complete
22 indicator of the financial condition of the
23 subsidiary tobacco company defendants?
24 A. I am not.
25 MR. SEXTON: I think we will take

50

1 a bathroom break at this point, if that works
2 for everyone else.
3 (Recess taken.)
4 MR. SEXTON: Back on the record.
5 Q. Dr. Burke, I wanted to ask you some
6 more questions regarding your May 18 expert
7 report. I apologize again if I double back or
8 ask you questions that I have already asked
9 you.
10 A. That's okay. I'm a teacher and
11 there are no bad questions.
12 Q. I think that what you have told me
13 is that looking at your May 18 expert report,
14 the market capitalization figure that you
15 provide for Philip Morris Companies, Inc. is
16 not an indicator of the financial condition or
17 ability to pay a debt of Philip Morris
18 Companies, Inc.?
19 A. Correct.
20 Q. Nor would it be --
21 A. It is an indicator of financial
22 acumen or financial -- I mean it is a financial
23 figure, but not a figure of ability to pay a
24 debt.
25 Q. And that would also be true for

51

1 Philip Morris, Inc., that is the market
2 capitalization number for Philip Morris
3 Companies, Inc. would not be an indicator of
4 the ability of the financial condition -- I'm
5 sorry. Strike that.
6 The same would be true for Philip
7 Morris, Inc., the market capitalization figure
8 for Philip Morris Companies, Inc. would not be
9 an indicator of financial condition or ability
10 to pay a debt of Philip Morris, Inc., the
11 defendant tobacco company?
12 MR. SMITH: I'm going to object. I
13 don't think he equated the two, so I'll object
14 to the form.
15 A. It would be an indicator -- I
16 forget exactly your question. The first thing,
17 financial condition, it would be an indicator
18 of financial condition. It would not be an
19 indicator of their ability to pay a debt. It
20 would be -- it is one of the indicators of
21 financial condition.
22 Q. In order for us to come to a

23 reasonable, precise understanding of the
24 financial condition of Philip Morris, Inc., the
25 subsidiary defendant tobacco company, we would

52

1 need more than just the market capitalization
2 of its corporate parent, Philip Morris
3 Companies, Inc.?

4 A. Yes, sir. I would look at the
5 income statements over a period, the balance
6 sheets of the subsidiary over a period of time.

7 Q. The market capitalization provided
8 in the May 18, 2001 expert report is just one
9 piece of information you would need in order to
10 make that analysis?

11 A. That's one piece of information I
12 would want to have, but as we just talked, the
13 market capitalization is what it is, it is a
14 financial indicator of the company, but if you
15 want to know about a company's ability to pay,
16 then I would look at other items, i.e., start
17 off with income statements and balance sheets.

18 Q. To be even more precise about it,
19 if I were to ask you to answer the question
20 what is the financial condition of Philip
21 Morris, Inc., you would need more than just the
22 market capitalization of Philip Morris
23 Companies, Inc. which you provide in your May
24 18 report?

25 A. Yes, sir.

53

1 Q. And the same would be true for all
2 of the other defendant tobacco companies?

3 A. If you are looking at the
4 subsidiaries, yes, sir.

5 Q. In preparing your May 18 expert
6 report that is marked as Burke 1, can you just
7 walk me through what you did?

8 A. Yes, sir. It is kind of simple. I
9 received an assignment from Mr. Smith, he asked
10 me to look at the value of these companies, he
11 told me the companies he wanted me to look at.

12 So I know how to figure out the
13 market value of a company, the capped value of
14 a company, the worth of a company. If it is a
15 publicly traded company, you look at the shares
16 outstanding, look at the value of the shares,
17 do a simple multiplication.

18 Anybody could do it, but it may
19 take an economist to explain to somebody that
20 is a market capitalization, market value, but
21 once you have explained the principle, anybody
22 can do the arithmetic, so that's what I did.

23 Q. You mentioned in the last sentence
24 of the first full paragraph of your May 18
25 report that valuing the original company --

54

1 A. Excuse me. Where are you?

2 Q. I'm looking at the last sentence of
3 the first full paragraph of your May 18 expert
4 report, and that sentence says, "This makes
5 valuing the original companies very difficult."

6 A. Yes, sir.

7 Q. Does that sentence mean that it is

8 difficult for you to value the defendant
9 tobacco companies that are listed on your May
10 18 expert report?

11 A. Nothing is difficult if you have
12 enough information, but if you lack
13 information, then it is difficult. And as I
14 say in the sentence before, over a period of
15 time there are mergers and acquisitions, and
16 therefore it is difficult to segregate, to
17 separate out, to look at an individual entity.

18 Q. That is something you could do if
19 you had more information?

20 A. If you have enough information,
21 yes, sir.

22 Q. You just didn't have enough
23 information here?

24 A. And I'm not sure I would ever have
25 enough information to follow the trail. Things

55

1 are bought and sold, especially when they are
2 bought and sold and not an arm's length
3 transaction, when they are bought and sold
4 within entities.

5 Q. You are not suggesting that any of
6 the defendants in this case or their parent
7 companies have engaged in any sort of
8 illegality with respect to mergers and
9 acquisitions and financial transactions?

10 A. I would not suggest illegalities.
11 I think judges and juries would do that. I
12 don't do that.

13 I would suggest that it would
14 appear to me as though the financial trail is
15 rather murky. Whether that happened
16 intentionally or by accident or coincidence, I
17 don't know. But the financial trail here is
18 difficult to follow, and it seems to me more
19 difficult than it should be.

20 So I don't know -- again, I don't
21 know if that is intentionally made murky or
22 not. I can't make a judgment.

23 Q. Your expert report assumes that the
24 tobacco company defendants and their parent
25 companies are legally distinct corporate

56

1 entities, true?

2 A. I know that Philip Morris, Inc. is
3 a corporation. It says incorporated, that is
4 what "Inc." states, so I know that is a
5 corporation. I know, therefore, there are
6 shares of stock in that corporation, but it is
7 my understanding that those shares of stock, at
8 least the majority of them, are owned by Philip
9 Morris Companies, Inc.

10 Q. Right. But you won't offer any
11 opinions in this case that proper corporate
12 formalities are not observed by either Philip
13 Morris, Inc. or Philip Morris Companies, Inc.,
14 will you?

15 A. I don't believe so.

16 Q. In other words --

17 A. I'm not going to offer any legal
18 opinions, if that's what you are asking, no.

19 I'm going to avoid that.
20 Q. I want to know if you are going to
21 tell the jury that there is no difference
22 between Philip Morris, Inc. and Philip Morris
23 Companies, Inc., that they are one in the same?
24 A. I go back to one of those ontology
25 classes. I will tell the jury that Philip

57

1 Morris, Inc. is wholly owned by Philip Morris
2 Companies, Inc. So I would not tell the jury
3 that they are the same, but I would tell the
4 jury that Philip Morris Companies, Inc. is
5 able to influence the destiny of Philip Morris,
6 Inc. because they own them 100 percent, and
7 when you own something 100 percent, you can
8 influence its destiny, and if you own something
9 100 percent, is that separate from you or not
10 separate from you or if it is part of the
11 whole.

12 And in the accounting sense, there
13 are some things you can do with your accounting
14 books, quite legitimate things you can do with
15 your books to make a company that you wholly
16 own, make it look worse or make it look better.

17 Q. But you don't have any evidence
18 that that's been done in this case?

19 A. I'm not suggesting that. I'm
20 saying when you own it, you can attribute -- I
21 mean if I own a company and you work for that
22 company and Russell Smith works for that
23 company, I could say, listen, I want you to go
24 over and work with Russell Smith, your pay is
25 going to be on company A, but your work effort

58

1 is in company B. I understand it, that's a
2 perfectly legitimate thing to do. There is
3 nothing immoral about that, nothing illegal as
4 far as I understand.

5 But if you are the owner of the
6 company, you can effect those kind of
7 decisions, you can move assets around. If I'm
8 going to buy -- if I wholly own you and I'm
9 going to buy your assets, that's not an arm's
10 length transaction. There can be a building
11 over there and I can say I'm going to buy it
12 for a dollar and the building may be worth 10
13 million.

14 Q. Do you know whether Philip Morris,
15 Inc. and Philip Morris Companies, Inc. have
16 their own separate boards of directors?

17 A. Yes, they do have their own
18 separate board of directors, that's how
19 corporations operate. Stockholders get to
20 approve the board of directors, board of
21 directors set policy and get to determine the
22 management. So by definition since they are
23 two separate entities, there should be two
24 boards of directors.

25 Now, are they the same people, I

59

1 have no idea. I do know if you are the parent
2 company and you own the stock, you get to
3 appoint who is on that board. Every

4 stockholder has that right, has that
5 privilege.

6 So it would be the privilege of
7 Philip Morris Companies, Inc. to appoint the
8 board, and there should be a board, there has
9 got to be a board, that's how corporations run,
10 but they are different people than is on the
11 board, they would be chosen by a different
12 process.

13 The Philip Morris Companies, Inc.
14 is going to be chosen by all of those millions
15 of people who own shares in that parent
16 company, but the subsidiary is going to be
17 owned -- going to be appointed by the
18 management of Philip Morris Companies, Inc.

19 Q. But as your report recognizes, and
20 this is a simple point that I'm probably making
21 more complicated than needs to be, your report
22 recognizes that Philip Morris, Inc. and Philip
23 Morris Companies, Inc., despite their parent-
24 subsidiary relationship, are legally distinct
25 corporate entities, true?

60

1 A. True.

2 Q. And the same would be true for all
3 of the other parents and subsidiaries on your
4 May 18 report?

5 A. True. Legally the corporation is a
6 legal entity in the eyes of the law, created in
7 the law only, it is a legal entity with rights
8 and privileges, but if you own that legal
9 entity, then you get your rights.

10 Q. But you won't in this case offer an
11 opinion that challenges the legally distinct
12 corporate nature of each parent and subsidiary?

13 A. I'm not going to offer any legal
14 opinions, and if I do, stop me, please. I'm
15 not a lawyer, I don't like to offer legal
16 opinions, I try to avoid doing that.

17 Q. Fair enough.

18 A. I offer economic opinions, but not
19 legal opinions.

20 Q. Have you had the opportunity to
21 review any internal documents from any of the
22 tobacco company defendants in this case?

23 A. I don't know what you mean by
24 internal documents.

25 Q. I should probably be more precise.

61

1 Have you had the opportunity to
2 review any documents from any of the tobacco
3 company defendants in this case that relate,
4 say, to smoking and health?

5 A. No, sir. I mean I read articles in
6 newspapers and magazines and things like that,
7 but that information did not come directly from
8 the company. It may have come indirectly from
9 the company. I have watched the hearings on
10 TV, but outside of that, I haven't.

11 Q. As an economist --

12 A. Let me back up a little bit on
13 that. I may have glanced a little bit at that,
14 but only glanced, because a couple of years

15 ago, we were -- we, my company, was involved in
16 the settlement by the attorneys general and the
17 tobacco companies and we did some work on some
18 health-related issues there. I'm not sure if I
19 glanced at some health-related documents, and
20 I'm not sure who they came from, but we did
21 some health-related things.

22 Q. But you don't have any specific
23 recall of reviewing a particular company's
24 documents relating to smoking and health?

25 A. I do not.

62

1 Q. And, in fact, as an economist, you
2 have not been retained to provide an expert
3 opinion on the contents of tobacco company
4 internal documents?

5 A. I have not.

6 Q. And you won't offer opinions on
7 that subject?

8 A. I don't intend to. I don't have an
9 assignment pending. I don't think I'm going to
10 be asked about that.

11 Q. You won't as an economist, you
12 won't offer any opinions at trial regarding
13 your views on the conduct of the various
14 tobacco company defendants?

15 A. Well, I don't think I'm going to be
16 asked questions about that.

17 Q. And you don't intend to offer any
18 opinions on that area?

19 A. Well, I have opinions in that area.

20 Q. I'm asking if you intend to as an
21 economist to offer any opinions on that area?

22 A. I'm not going to volunteer those
23 opinions, but you ask me about them, I will
24 answer your questions.

25 Q. I promise you I won't ask you those

63

1 questions.

2 Just to clarify, you won't offer to
3 the jury any opinions as an economist on the
4 conduct of the tobacco company defendants?

5 MR. SMITH: I'm going to object. I
6 think the answer was as clear as he could be:
7 If asked, he will.

8 A. If asked, I will, and if I have
9 information, I will. I'll try not to cough,
10 but I don't intend on getting into that area.
11 I have not been asked to do that. I haven't
12 done that. That's not something that I have an
13 assignment pending on. I'm not the economist
14 or the biologist that would give -- I know
15 statistics, but I'm not the economist or
16 biologist that would connect smoking and
17 health.

18 I am an individual, but --

19 Q. I'm afraid that I'm still a little
20 bit confused, and just to clarify, and I'll
21 give you a running objection to asked and
22 answered, you do not intend as an economist to
23 offer opinions at this trial about the conduct
24 of the tobacco company defendants in case?

25 MR. SMITH: Objection to the form.

1 Would you please define the word conduct. What
2 type of conduct? Are you talking about moral
3 conduct?

4 MR. SEXTON: I'm talking about any
5 conduct.

6 MR. SMITH: You're going beyond
7 moral conduct?

8 MR. SEXTON: Russ, if the witness
9 doesn't understand my question, he can ask me.

10 MR. SMITH: I'm objecting to form,
11 and I made it as clear for you as I possibly
12 could. I stand on my objection.

13 A. I believe my testimony is going to
14 be restricted to the financial conduct of this
15 company --

16 Q. Perfect.

17 A. -- these companies.

18 Q. Thank you very much.

19 I meant to ask you this before:
20 When we were talking about tobacco company
21 documents, you also have not had the
22 opportunity to review any documents from The
23 Tobacco Institute?

24 A. There are some records available on
25 the internet.

1 Q. Have you reviewed them?

2 A. There is a -- what is the
3 publication, Tobacco News or Tobacco Reports or
4 something like that. I have looked at some of
5 those.

6 Q. But do you intend to offer any
7 opinions at trial regarding the contents of
8 Tobacco Institute documents you may have seen?

9 A. Unless they might relate to market
10 share or capitalized value or something like
11 that, with that exception, no.

12 Q. As we sit here today, can you think
13 of a Tobacco Institute document that you are
14 going to comment on or rely upon?

15 A. No, I cannot.

16 Q. Would the same be true for
17 documents from The Council for Tobacco Research
18 or The Tobacco Industry Research Committee?

19 A. Same answer.

20 Q. And as you mentioned before, with
21 the tobacco company defendants themselves, you
22 won't be offering any opinions at trial on the
23 conduct of The Tobacco Institute or The Council
24 for Tobacco Research or The Tobacco Research
25 Committee?

1 MR. SMITH: Same objection as to
2 form.

3 A. I'll be commenting on financial
4 conduct. That's it.

5 Q. I can make this question more
6 precise. You don't intend to comment on the
7 nonfinancial conduct at trial of any of the
8 tobacco company defendants or The Tobacco
9 Institute or The Council for Tobacco Research
10 or The Tobacco Research Committee?

11 A. You are absolutely correct. Those
12 are not areas I have studied, so that alone
13 would preclude me from commenting on that.
14 However, I do not control the
15 questions that either you ask or your other
16 colleagues in this room might ask, and if I'm
17 asked a question and I'm able to answer, I will
18 try to answer it.
19 Q. Have you ever heard of Hill and
20 Knowlton?
21 A. Doesn't ring a bell. How do you
22 spell Knowlton?
23 Q. K N O W L T O N.
24 I take it then you haven't reviewed
25 any documents from Hill and Knowlton?

67

1 A. Doesn't ring a bell with me.
2 Q. And as an economist, you have not
3 been retained to offer the opinion that
4 anything the tobacco company defendants did or
5 failed to do -- strike that.
6 As an economist, you have not been
7 retained to offer an opinion that any of the
8 defendants did or failed to do something for
9 which they should be subject to punitive
10 damages?
11 A. Have not been asked that.
12 Q. And you don't intend to offer an
13 opinion on that at trial?
14 A. I don't think I can answer that
15 question as an economist. I don't have an
16 opinion on that.
17 Q. A related question, similarly, you
18 have not been retained to offer an opinion at
19 trial that David Tompkin's injury was the
20 result of misconduct that manifested a flagrant
21 disregard for his safety?
22 A. I have not been asked to render an
23 opinion on that.
24 Q. And you won't offer an opinion on
25 that?

68

1 A. I don't have an opinion on that.
2 Q. Do you know whether Lorillard
3 Tobacco Company is the only subsidiary of Loews
4 Corporation?
5 A. Don't remember. I don't think so,
6 but I don't remember precisely.
7 Q. Do you know what company owns the
8 outstanding shares of Lorillard Tobacco
9 Company?
10 A. Yes, sir.
11 Q. And what company is that?
12 A. It is a company that in the past
13 has been known as the Brooke Group Ltd., and I
14 think it is now goes by the name of Vector.
15 Q. I think you may be confusing
16 Lorillard with Liggett.
17 A. I'm sorry, I answered the Liggett
18 question.
19 Q. I was asking about Lorillard.
20 A. I'm sorry, I must have drifted off.
21 Would you repeat the question, please. Short

22 trips are wonderful.
23 Q. No problem. Do you know who owns
24 the outstanding shares of Lorillard Tobacco
25 Company?

69

1 A. I believe they are owned by Loews
2 Corporation.
3 Q. Do you know if there are any other
4 intermediary companies between Loews and
5 Lorillard Tobacco Company that own those
6 shares?
7 A. Intermediate companies or
8 individuals?
9 Q. Companies.
10 A. No, I don't know. I don't know.
11 Q. There might be, you just don't know
12 one way or the other?
13 A. I just don't know.
14 Q. Do you know whether Lorillard
15 Tobacco Company owns shares in Loews
16 Corporation?
17 A. Whether Lorillard owns share in
18 Loews?
19 Q. Yes.
20 A. And Loews owns shares in Lorillard?
21 Q. Yes.
22 A. No, I don't know that. That's
23 possible, and as we talked earlier, companies
24 keep a list of who own their shares, so if we
25 go to Lorillard, that's a corporation, they

70

1 will have a list of their shareholders.
2 Q. I'm interested in what you know.
3 A. No, I don't know. But that's a
4 piece of information that you can find out.
5 But I don't know the answer to that.
6 Q. Have you ever heard of a company
7 called Lorillard, Inc.?
8 A. I don't think so, but hearing that
9 name, I would associate it with the Lorillard
10 companies, but I don't have a distinct memory
11 of Lorillard, Inc.
12 Q. You don't have any particular
13 knowledge about what relationship Lorillard,
14 Inc. might have to Lorillard Tobacco Company
15 and to Loews Corporation?
16 A. No, I do not.
17 Q. You don't have any particular
18 knowledge about what business Lorillard, Inc.
19 is engaged in?
20 A. I do not. That's out of that part
21 of that problem that I mention in the first
22 paragraph, which is mergers and acquisitions
23 and change of names of companies, and so it is
24 somewhat difficult to follow the trail.
25 Q. Burke 1, your May 18 expert report,

71

1 provides a market capitalization to Philip
2 Morris Companies. Do you know how many
3 subsidiaries Philip Morris Companies has?
4 A. I do not. That should be
5 relatively easy to find out in the public
6 records though. I didn't commit it to memory.

7 Q. With respect to parent corporations
8 and their subsidiaries, would you agree that
9 often times the sum is worth more than the --
10 strike that.

11 With regard to a parent corporation
12 and their subsidiaries, would you agree that
13 often times the whole is greater than the sum
14 of the parts?

15 A. Yes, sir. Especially if there is a
16 synergistic relationship.

17 Q. What do you mean by that?

18 A. That the whole is greater than the
19 sum of the parts: That there is me, there is
20 you, and there is the interaction between us.
21 There is the Father, the Son and the
22 interaction between the Father and the Son
23 which produces the Holy Ghost.

24 Q. I follow you on that.

25 A. I thought you would.

72

1 Q. And, for example, if we are talking
2 about Philip Morris Companies, are you aware
3 that some analysts have said that Philip Morris
4 Companies itself would be worth more if it spun
5 off or got rid of Philip Morris, Inc., the
6 tobacco company?

7 A. I'm not aware of that.

8 Q. Would that surprise you?

9 A. I want to look at all of the data
10 first and then make my own decision on that and
11 then decide whether they are right or wrong.

12 I know that recently Philip Morris
13 Companies has spun off the subsidiary, or I
14 don't know if it is a wholly owned subsidiary
15 or what the relationship was, but they have
16 spun off Kraft, and there is now a stock traded
17 in Kraft.

18 Q. So to be precise, they have spun
19 off 18 percent of Kraft.

20 A. Correct. They still own a large
21 block of Kraft, but they have spun off a
22 portion of it.

23 There was a period of time in the
24 60s and companies doing different things came
25 together in a conglomerate, so you had the same

73

1 company producing steel, tennis balls and
2 airplanes, which seemed to be unrelated. Then
3 we went through a period in the late 80s and
4 90s when they tried to unbundled those
5 conglomerates, both in an attempt to make
6 additional money.

7 Q. Are you familiar with publications
8 like Dun & Bradstreet and Standard & Poor's?

9 A. Yes.

10 Q. Would publications like those
11 provide us with information about the financial
12 condition of companies listed in those
13 publications?

14 A. Sure. Dun & Bradstreet is a
15 credited rating service, so if you are
16 subscribing, you can get information on
17 companies, and Standard & Poor's also provides

18 a lot of financial information about companies.
19 Q. Are you and your firm subscribers
20 to Dun & Bradstreet and Standard & Poor's?
21 A. No, sir. I use them on an ad hoc
22 basis.
23 Q. Is that information available on
24 the internet?
25 A. A lot of the S&P information is

74

1 available on the internet. It is also
2 available in the library if you want to look
3 back historically.
4 Q. But none of that information was
5 used in preparing Burke 1?
6 A. No. Burke 1 is kind of a simple
7 straightforward calculation of shares of stock
8 times the number of shares.
9 Q. And it is what it is?
10 A. It is what it is, yes, sir.
11 MR. SEXTON: I think I need
12 another break. I may be done with my
13 questions, although there are other folks who
14 may want to ask you some questions.
15 (Recess taken.)
16 MR. SEXTON: We will go back on
17 the record.
18 Q. Dr. Burke, can you tell me whether
19 you prepared this May 18 expert report
20 yourself?
21 A. Yes, I did, with the assistance of
22 Brad Humel.
23 Q. Who is seated next to you?
24 A. Who is seated next to me, yes, sir.
25 Q. Did you personally go on the

75

1 internet and find the share price and the
2 outstanding shares?
3 A. I did not. I asked Mr. Humel to do
4 that.
5 Q. Did you do the market
6 capitalization calculation or did he do that?
7 A. We both did it. We both know how
8 to multiply.
9 Q. It is a simple calculation?
10 A. It is a simple calculation.
11 Q. And how much time would you
12 estimate that you spent -- strike that.
13 How much time did you spend
14 preparing your May 18 expert report?
15 A. I have those records, and I can get
16 you those records, but I don't have a memory of
17 it now.
18 Q. Could you give me a rough ballpark?
19 A. No. But I make a note to myself on
20 how much time I have into this up to May 18.
21 Q. Sure. Did you confer with Mr.
22 Smith before you prepared your May 18 expert
23 report?
24 A. Many many many times, yes, sir.
25 Q. Besides yourself and Mr. Humel, did

76

1 anyone else work on this May 18 expert report?
2 A. I believe that Harvey Rosen may

3 have had some input into this and we discussed
4 it in and around the office a lot. This case
5 has occupied a lot of time at my office, and
6 also Mr. Alex Constable, who is also an
7 employee of Burke, Rosen & Associates.

8 Q. Who was it that decided that a
9 market capitalization of the tobacco company
10 defendants' parent corporations was the way to
11 proceed in this case?

12 A. All of us. That was our first
13 approach to this, and because what we were
14 looking at was the value of the parent, so to
15 look at the value of the parent, we did a
16 market capitalization of the parent. That's
17 what we are looking at in the May 18 report.
18 And it is kind of standard for any economist.

19 Q. Prior to May 18, 2001 when you
20 issued the expert report that is marked as
21 Burke 1, did you generate any other paperwork
22 or reports or files with respect to the
23 opinions that are in Burke 1?

24 A. No, sir, on the issues we are
25 talking about. I had issued a couple of

77

1 reports years ago on earning capacity, but not
2 on market value of these entities.

3 Q. So just for the sake of clarity,
4 with respect to your May 18, 2001 expert
5 report, there is no other documentation or
6 material that your office has generated with
7 respect to the opinions that are in there?

8 A. In terms of a report, nothing. Are
9 there backup materials for this report, yes,
10 there are, but this was the report.

11 Q. And what would those backup
12 materials for your May 18 report be?

13 A. Oh, they would show the things that
14 are in the report. They would show market
15 value of the stock at different points in time,
16 they would show number of shares outstanding,
17 they would show name of parents, those kind of
18 things, things that are in this report.

19 I also, although I don't
20 specifically say it, as you can see from that
21 first paragraph, I looked at this data over a
22 period of time. I didn't look at it as the
23 snapshot at one point in time, because as I say
24 in that second line, as you know, Mr. Smith,
25 over the last few years, there has been much

78

1 merger and acquisition activity.

2 So I looked -- I was collecting
3 data over a period of years, so that would also
4 be in the file.

5 Q. But your May 18 report contains
6 only the share price for each of the publicly
7 traded companies as of May 18?

8 A. Absolutely. That's what this
9 report is about.

10 Q. Your May 18, 2001 expert report
11 provides the number of outstanding shares for
12 each parent company as of May 18?

13 A. Yes, sir.

14 Q. Let me just follow up with that
15 real quickly. There is no opinion contained in
16 your May 18, 2001 expert report with respect to
17 the financial condition of the subsidiary
18 tobacco company defendants?

19 A. Correct. I did that in a
20 subsequent report.

21 By the way, I would like to correct
22 an error in this May 18, and that is that the
23 Liggett Tobacco, or I say Brooke Group is the
24 present owner and it is the privately held. I
25 believe that was owned by Vector at that point

79

1 in time. It doesn't change any of the numbers
2 or anything.

3 Q. Okay.

4 A. Just for purposes of clarity.

5 Q. I think I just asked you this
6 question, but your May 18 expert report that we
7 are looking at marked as Burke 1 provides no
8 opinion as to the financial condition of the
9 tobacco company defendants in this case?

10 A. Correct. It is the parent that is
11 addressed in this. The subsidiary is addressed
12 in subsequent reports.

13 Q. But in the May 18 report, it is
14 only the parents?

15 A. Only the parents. That's the
16 starting point, then I would go to the
17 subsidiary.

18 Q. I'm just asking about the May 18
19 report.

20 A. Just the parent.

21 Q. At this point I'm going to pass the
22 baton to my colleagues and reserve any
23 remaining time I might have until after they
24 are finished.

25 MR. SMITH: I want to mention one

80

1 thing just before you do pass the baton. You
2 asked him the question earlier how you come to
3 the value of various --

4 MR. SEXTON: Do you want this on
5 the record?

6 MR. SMITH: I would like it on the
7 record.

8 MR. SEXTON: Is this something that
9 can wait until after we are done?

10 MR. SMITH: Well, I thought it
11 should be mentioned before then personally, and
12 I think I will. I want to just inform you of
13 something at trial --

14 MR. SEXTON: Should the witness be
15 excluded before we have this discussion?

16 MR. SMITH: I don't think so. It
17 won't affect the witness.

18 MR. SEXTON: I would rather not
19 interrupt the flow.

20 MR. SMITH: I want to put this on
21 the record.

22 MR. SEXTON: Is this an objection
23 or what is this?

24 MR. SMITH: I'm going to put this

25 on the record.

81

1 MR. SEXTON: I don't think you are
2 entitled to make a speech on the record.

3 MR. SMITH: I want to make a piece
4 of information on the record.

5 MR. SEXTON: You will do what you
6 do.

7 MR. SMITH: You asked the question
8 earlier how you figure the value of various
9 entities, and I do want to indicate to you that
10 at trial we intend on asking him the question
11 as to how do you compute the value of a wholly
12 owned subsidiary of a parent corporation.

13 I expect I'm going -- my intention
14 is if permitted to ask him that question, and
15 I'm giving you that information so you have it
16 before you complete the deposition. That's
17 why.

18 MR. SEXTON: Go ahead, Diane.

19 MS. CHAPMAN: Russ, you are aware
20 of the Court's order that we had on Dr. Burke's
21 report?

22 MR. SMITH: I absolutely am.

23 MS. CHAPMAN: And you have no
24 intention of doing anything other than what the
25 Court has already advised us?

82

1 MR. SMITH: Diane, I have the
2 intention of asking Dr. Burke that question,
3 and if permitted by the Court to do so, he will
4 answer the question. I'm just stating that for
5 your information.

6 MS. CHAPMAN: Well, and I think it
7 is unfair to Dr. Burke at this point for us
8 to -- any of us, none of us are smarter than
9 the judge, all of us are limited in the order
10 that I'm referring to for the record resolved
11 documents number 278 and 293, it is an order
12 dated July 18, 2001 by our judge in this case,
13 David Dowd, Jr., and on pages two and three of
14 that order, he tells us specifically what he
15 has excluded Dr. Burke from testifying to,
16 Russ, and so we just want to let you know our
17 deposition today has been solely tailored to
18 confine ourselves to the Court's order so that
19 you know, and we are taking the position that
20 this Court has made it clear, expects people to
21 be following his orders, and so while we cannot
22 control what you might or might attempt at
23 trial, anything at trial that is different than
24 what the judge has already told us to do
25 clearly in our position is improper and we

83

1 don't want to be accused of somehow not
2 following an order and be punished by it.

3 So I'm wondering if you want me to
4 get the judge on the phone now and say, your
5 Honor, we are conducting a deposition, we are
6 going by your order, because I don't know what
7 you are telling us. But we certainly don't
8 want to be prejudiced for following the order
9 of the Court.

10 So are you going to be filing a
11 motion to reconsider in some way before you do
12 this?

13 MR. SMITH: Whether or not we are
14 going to file a motion to reconsider anything
15 would be another issue. Putting that aside,
16 the Court's order indicated that his second
17 opinion was stricken.

18 MS. CHAPMAN: Correct.

19 MR. SMITH: The Court's order did
20 not say that he would not be allowed to explain
21 concepts that an economist would utilize.

22 Now, whether it is included therein
23 by implication or not, I don't know. I'm just
24 indicating that if we are permitted to do so,
25 I'm intending on asking that question. If we

84

1 are not, I won't.

2 MS. CHAPMAN: And on behalf of
3 Philip Morris, my reason for bringing the order
4 to our attention, to try to bring to anybody
5 who might look at this transcript, particularly
6 the Court if it gets there, is that we have
7 very fairly and carefully studied the order,
8 and, Russ, you know that the Court, there is
9 language in there that if we go beyond the
10 order, potentially we might put ourselves at
11 risk. That is why we have used May 18.

12 But I don't think the order forbids
13 us to get into an area because the Court is
14 going to exclude it but then allows you to
15 pursue that same area at trial. So I don't
16 think any of us here can -- there is any use in
17 debating what the Court may or may not do at
18 trial.

19 I want it clear we tried to follow
20 the order, and if you think there is some
21 reason, Russ, to get the judge on the phone
22 now, we can do that too. I don't think there
23 is a problem. I don't know what the Court
24 would tell us other than I issued my decision
25 on that, you have my order, follow it.

85

1 Terry, do you have anything to add
2 for Lorillard?

3 MR. SEXTON: I think on behalf of
4 Lorillard and Philip Morris, you have covered
5 the defendants' position with respect to this
6 deposition and the contours within which it has
7 been conducted up to now.

8 So if one of the other counsel for
9 the other defendants wants to pursue with the
10 inquiry.

11 MR. SHIVELY: Same response for the
12 American Tobacco Company.

13 MR. WALSH: This is Ken Walsh on
14 behalf of Liggett. I want to adopt the same
15 position as stated by Ms. Chapman. It is
16 Liggett's position that discovery is to be
17 consistent with what is ordered by the Court
18 for trial purposes, that is up to and including
19 the May 18 report and what has been stricken by
20 the Court.

21 So that's the position of Liggett
22 with regard to this deposition. Thank you.
23 MR. SEXTON: At this point I'll
24 defer to counsel for American who wishes to
25 inquire.

86

1 MR. FIEWUS: One other point, to
2 the extent any doors are opened and testimony
3 concerning anything other than the May 18, 2001
4 report becomes an issue, Liggett reserves the
5 right to continue this deposition and examine
6 the witness further before trial testimony, and
7 I expect that Liggett's joint defendants in
8 this case would agree with that position and
9 also seek to continue the deposition before
10 trial testimony on any points other than the
11 May 18 report.

12 MR. SEXTON: Lorillard and Philip
13 Morris would adopt the exact position that has
14 been articulated by Liggett's counsel.

15 MR. SHIVELY: American Tobacco will
16 adopt that as well.

17 MR. SEXTON: We will take a very
18 quick break here.

19 (Recess taken.)

20 EXAMINATION OF JOHN F. BURKE, JR., Ph.D.

21 BY MR. SHIVELY:

22 Q. How are you doing, Dr. Burke?

23 A. I'm good. Tell me your name again.

24 Q. It is Ben Shively, and I represent
25 the American Tobacco Company.

87

1 A. Yes, sir.

2 Q. Generally speaking, would you agree
3 that the more you know about a company and its
4 industry the more reliable and accurate your
5 evaluation will be?

6 A. Yes, sir. But there is a curve
7 there, and knowledge trails off. I mean it is
8 an asymptote, you may spend more and more time
9 and learn less and less. The more you know the
10 better off you are.

11 Q. Sure. In preparing an evaluation
12 of a privately owned tobacco company, what
13 types of data or information would you normally
14 want to review?

15 A. I would want to see their financial
16 records, I would want to see their balance
17 sheets, I would want to see their income
18 statements, I would want to see their tax
19 returns.

20 Q. In preparing your May 18 report, I
21 guess it is Burke 1, did you review any of the
22 defendant tobacco companies' financial
23 statements?

24 A. No, sir.

25 Q. And that would include balance

88

1 sheet, income statement, statement of cash
2 flow?

3 A. It would include those things, and
4 I did not review them.

5 Q. Okay.

6 A. I might have had some of that
7 information, but that's not what I was
8 concentrating on at the time.

9 Q. Okay. If you were hired to
10 evaluate a privately held tobacco company,
11 would you also want to know the company's
12 market share in the industry?

13 A. Depending on what my assignment in
14 the evaluation is, then that might be
15 interesting to know.

16 Q. The financial ability to pay, the
17 company's financial ability to pay a debt, if
18 that was a factor, would you want to know the
19 company's market share in the industry?

20 A. Yes, sir, I would like to know
21 that. That's part of that first question, you
22 would like to know everything.

23 Q. Do you know when you prepared the
24 May 18 report, did you know the market share of
25 any of the defendant tobacco companies?

89

1 A. Not with any specificity. I mean I
2 knew that Philip Morris was a big player, I
3 knew that their brand was a big player, but I
4 couldn't tell you.

5 Q. What is their brand?

6 A. Marlboro, and I know that that's
7 been about half the American market.

8 Q. Do you know the market share of --
9 would it also be important to know the market
10 share of its competitors? If you are valuing
11 one tobacco company, would you like to know the
12 market share of its competitors?

13 A. Yes. If you know market share, you
14 are looking at the pie, and the pie is made up
15 of all the players.

16 Q. Do you know the market share of any
17 of the other defendant tobacco companies?

18 A. Not from memory, no.

19 Q. Did you know it at the time you
20 prepared your May 18 report?

21 A. The May 18 report did not deal with
22 that issue. I don't know if I knew it or not.
23 I knew about Marlboro in general, but I don't
24 think I knew with any specificity. I might
25 have had that data, but that's not what the May

90

1 18 report was all about.

2 Q. If you were asked to value a
3 company, would it be relevant in your valuation
4 calculation to know whether the company you are
5 evaluating has increased or decreased its
6 market share historically?

7 A. If it is a publicly held company?

8 Q. This is a privately held company.
9 Let's assume it is a privately held tobacco
10 company.

11 A. The marketplace gathers all that
12 information for you and summarizes it in the
13 price per share and the number of shares
14 outstanding. So all of that work effort that
15 you just mentioned, which is very valuable and
16 you would want to know it, but the market has

17 taken all of that plus a thousand other things
18 into consideration already. And so if you want
19 to determine the value of this company, price
20 of the shares, number of shares outstanding,
21 and you have picked up all of that.

22 Q. You are talking about publicly held
23 companies; is that correct?

24 A. Even a privately held company. If
25 the market tells you here is what the price of

91

1 this share -- I'm assuming it is a corporation
2 so there are shares, I mean if it is a
3 partnership or a single proprietorship.

4 Q. Let's make it more specific. Let's
5 talk about these individual tobacco companies,
6 the situation where they are a wholly owned
7 subsidiary.

8 A. If they are incorporated, then
9 there will be shares. That's how you own a
10 corporation. So if God tells you the number of
11 shares that are outstanding and what the market
12 price of those shares would be, all you have to
13 do is multiply one times the others and all of
14 these others things that you mentioned that are
15 very important are all caught up in that one
16 value if you are looking at the value of the
17 company.

18 Q. At the time you prepared your May
19 18 report, did you know the share price of any
20 of the defendant tobacco companies?

21 A. I did not.

22 Q. Is that publicly available?

23 A. No, sir.

24 Q. Now, let's assume that that
25 information is not publicly available.

92

1 A. That's why I said earlier God has
2 told us.

3 Q. I understand.

4 A. And God doesn't talk to me about
5 that very often.

6 Q. And assuming in this situation --
7 he doesn't talk to me very often either.

8 Assuming you are in the similar
9 situation where you have one of the
10 defendant -- one of the four defendant tobacco
11 companies, would it be relevant if you were
12 asked to value the company to know the market
13 share, whether the market share of a particular
14 company has increased or decreased
15 historically?

16 A. If we don't have those two other
17 pieces of information which I talked about
18 again and again --

19 Q. Which we don't.

20 A. Which we don't, then you have got
21 to go to proxies, and one of the proxies for
22 value that you would want to know is market
23 share, and you would also want to know what has
24 happened to that market share over a period of
25 time, and you would also want to know, if

93

1 possible, what is going to happen to that

2 market share in the future.

3 Q. Is it accurate to say when you
4 prepared your May 18, 2001 report that you did
5 not know for any of the defendant tobacco
6 companies whether their market share has
7 increased or decreased?

8 A. I don't know if I had that
9 information at that time, but if I did, I
10 wasn't using it. That's not what I was doing
11 in the May 18 report.

12 Q. All right. Very good. Now let's
13 move to operating profit. Can you define that
14 for me?

15 A. Yes, sir. It is the profits, and
16 profits are defined as revenue minus costs from
17 the operation of a particular entity.

18 Q. Okay.

19 A. And when I say operation, I mean
20 from the manufacture or production of a
21 saleable element.

22 Q. What is not including in operating
23 profit?

24 A. Well, a company may have revenue
25 from other sources. So I may be a company that

94

1 sells economic services, but somewhere along
2 the line, a lawyer who was in tough straits
3 said, Burke, I can't afford to pay you, but I
4 have a building, I'll give you a building.

5 Now I'm a landlord. So part of the
6 income of Burke, Rosen & Associates is not only
7 to be income from services sold to lawyers, but
8 there is going to be rental income. The rental
9 income is not from operations.

10 Another lawyer may have said,
11 Burke, I can't afford to pay you, but here is
12 100,000 worth of U.S. Government bonds due and
13 payable in 30 years. So now my company has
14 interest income. That's not from operations.

15 Even if I ceased operations as
16 offering economic services in the litigation
17 area, I can still collect the rents, I could
18 still collect the interests, or if I were to
19 die, my heirs could still collect the rent and
20 the interest, and they would like that even
21 better because the middleman, me, is gone now.

22 Q. If you were hired to value a
23 company --

24 A. Excuse me. If I could also add
25 there might also be expenses that are not from

95

1 operations. I talked about revenues, but there
2 also might be costs.

3 Q. Okay. My next question, if you
4 were engaged to value a privately held tobacco
5 company, would you want to know that company's
6 historical operating profits?

7 A. I would.

8 Q. As of the date you prepared your
9 May 18 report, did you know what the operating
10 profits for any of the defendant tobacco
11 companies was?

12 A. I had information on that. I don't

13 know if I had it for each and every company,
14 and I don't remember specifically when I got
15 that information. But I think I had some at
16 that point in time, but that was not the focus
17 of this report, so even if I had it, I wasn't
18 looking at it. I mean I wasn't looking at it
19 in the sense of trying to analyze it.

20 Q. So you didn't use that information
21 to develop your opinion for the May 18 report?

22 A. There is only two pieces of
23 information I used in the May 18 report, one is
24 the number of shares, the other is the price
25 per share. I had other information, but it is

96

1 not what I was addressing at that point in
2 time.

3 Q. Would it also be important to know
4 the projected operating profits for those
5 companies if you were to value them?

6 A. I would like to know that. I also
7 would have to discount that because it is a
8 forecast, but I would like to know that.

9 Q. Sure. Next question is in valuing
10 a company, would you want to know what the
11 company's sales volume is?

12 A. Yes, sir, and I think I would want
13 to know it in two ways: I would want to know
14 it in dollars and I would want to know it in
15 quantity. I don't have to know it, but I would
16 like to know it.

17 Q. As of May 18, 2001, did you know
18 the sales volume of any of the defendant
19 tobacco companies in dollars or quantity?

20 A. It is kind of the same information,
21 the same answer that I gave you before. I was
22 in the process of collecting and gathering
23 information. I think I had some of that
24 information at that point in time. Don't know
25 if I had it for all companies, don't know for

97

1 what period of time I had it, but the Burke 1
2 doesn't deal with that issue.

3 Q. Would you also want to know whether
4 the defendant tobacco companies' sales volume
5 has increased or decreased over a certain
6 period of time?

7 A. Yes, sir. I would want to know the
8 history, short term, intermediate, long term
9 history of the items that are on their balance
10 sheet and the items on their income statement,
11 and that would give me that information you
12 just asked me about.

13 So I would want to know what
14 revenues, I would want to know what has
15 happened to cost, I would want to know what
16 happens to profits over time.

17 Q. But as of May 18, you did not have
18 the information to assess whether their sales
19 volume has increased or decreased?

20 A. No, I haven't said that. I said I
21 think I have some of that information.

22 Q. What did you have?

23 A. I don't know. I think I had some

24 of that information about some of the
25 companies, but that's not what I was

98

1 concentrating on. When you try to garner
2 information about one of these companies, in
3 the process of garnering information about the
4 stock price, you also pick up information about
5 profits and about sales, and there might even
6 be a forecast and there might even be two or
7 three in the last quarter.

8 So in the process of getting the
9 information I was looking for to do the May 18
10 report, I picked up that other information, but
11 I didn't concentrate on it, I didn't look at
12 it.

13 Q. And it wasn't used?

14 A. It wasn't used. Two pieces of
15 information were used to produce the May 18:
16 Price of the stock and number of shares. No
17 other information, whether I had it or didn't
18 have it, but no other information was utilized.

19 Q. And you were also not aware of what
20 the projected sales volume from any of these
21 companies was?

22 A. I'm not aware of that. That may be
23 in the information I selected. Wall Street
24 likes to forecast what a company's earnings are
25 going to be, so they expect you to make 25

99

1 cents a share or whatever. Wall Street is
2 always forecasting that. So that is a forecast
3 of the future, so that information might have
4 been available on the data I was picking up.

5 That again wasn't what I was
6 looking at. I was looking at share price and
7 number of shares.

8 Q. Would Wall Street normally project
9 the subsidiary's of a parent company price per
10 share?

11 A. They could. A lot of this always
12 starts with the company. If the company comes
13 out and says, listen, we are going to make 50
14 cents a share this quarter and most of that is
15 going to come from our subdivision A, which is
16 doing gang busters but it has to be netted off
17 on division B, but on balance. They may talk
18 about their subsidiary. Not everything goes
19 along at the same rate.

20 Q. Now, if you were hired to value a
21 company, would you also want to know the brands
22 the company manufactured?

23 A. Yes, I would want to know their
24 brands, but I don't think that would play a big
25 role. That would not be a big deal.

100

1 Q. Why is that?

2 A. Because the brand names can be
3 owned by different people. There can be a
4 brand name I can honor, I can sell it to you,
5 you can sell it to me. Brand names might
6 change over a period of time.

7 A rose by any other name would
8 smell as sweet. Shakespeare addressed the

9 issue.
10 Q. Sure.
11 A. So I would like to know the band
12 names, but I'm not sure the name is crucial.
13 Q. So under your analysis, the value
14 of a brand doesn't appear to be that important;
15 is that what you are telling me?
16 A. It is one of the components. We
17 are kind of looking at a mosaic, and in a
18 mosaic, there are many tiles, and one of the
19 tiles might be brand name, another one might be
20 the personality of the head of the company,
21 another tile might be 1963, another tile might
22 be 1978, another tile might be the first
23 quarter of last year.
24 It is a mosaic and you have all of
25 these tiles and everything is important. Some

101

1 things are more important, but everything is
2 important, and as you asked me earlier, you
3 said, Burke, would you like to know a lot, and
4 the answer is yes, but my Jesuit training told
5 me you can never know everything about one
6 thing.
7 Q. Do you know what brands the four
8 defendant tobacco companies manufactured, their
9 top four brands of each company?
10 A. Marlboro would be in the Philip
11 Morris group. I think Lucky Strike would be
12 American Tobacco. Don't hold me to these.
13 Q. I won't.
14 A. I think Liggett made L&M. I don't
15 know.
16 Q. Do you have any idea what brand
17 Lorillard makes?
18 A. No, not from memory. And again
19 that's not an issue I addressed in Burke 1.
20 Q. Would it also be important to know
21 when valuing a company whether the brands that
22 a particular company sells were discount brands
23 or premium brands?
24 A. Sure. That would affect sales
25 revenue.

102

1 Q. Do you have any idea whether the
2 brands, say the top two brands of each company,
3 what they sell, the top two brands in sales
4 volume, whether they are discount brands or
5 premium brands?
6 A. I do not. Marlboro is a premium
7 brand. I couldn't tell you any others. That's
8 not something I addressed in Burke 1, something
9 I would be prepared to address if I go to court
10 and I'm going to testify in this case on those
11 kind of issues.
12 Q. But as of May 18, 2001, you do not
13 know?
14 A. I didn't know, no, sir. I was
15 concentrating on two things: Number of shares,
16 price per share.
17 Q. In valuing a company, would you
18 also want to know the past and projected cash
19 flow for that company, particularly a privately

20 held corporation?
21 A. Particularly for any company I
22 would want to know something about the cash
23 flow, and if you had the accounting records
24 that we talked about before, if you didn't have
25 that specifically, you could construct it.

103

1 Q. In preparing your May 18 report,
2 did you know the cash flow or the projected
3 cash flow for any of the defendant tobacco
4 companies?

5 A. I believe I had information
6 sufficient to construct that, but I didn't
7 construct it and I wasn't interested at that
8 point in time. I was only interested in two
9 pieces of information.

10 Q. As of May 18, did you know the cash
11 flow of any of the defendant tobacco companies?

12 A. I think I had that information on
13 some of the companies. I'm not sure if I had
14 it on all of them.

15 Q. Can you tell me what that was?

16 A. No, I can't. I didn't concentrate
17 on that, but in the process of collecting the
18 information that I was going to concentrate on,
19 you pick up that information.

20 Q. And I assume, correct me if I'm
21 wrong, that you did not know the projected cash
22 flow as of May 18 for any of the defendant
23 tobacco companies?

24 A. You are correct. Although I might
25 have had that information at my disposal, but I

104

1 didn't look at it, didn't concentrate on it.

2 Q. Would it also be true that you
3 would in valuing a privately held tobacco
4 corporation or wholly owned subsidiary, would
5 you want to know any significant events or
6 obligations that may impact future cash flow?

7 A. Sure.

8 Q. As of May 18, 2001, were you aware
9 of any significant events that would affect its
10 future cash flow for any of the four defendant
11 tobacco companies?

12 A. I think I had some of that
13 information. At I mentioned, I was collecting
14 information, but I didn't concentrate on that,
15 and that may be in the information that I have,
16 but I didn't pay any attention to it.

17 Q. Sitting here today, you can't tell
18 me as of May 18 what information you had
19 available to you?

20 A. You are correct.

21 Q. We are getting near the end here.

22 A. That's okay. As I said before,
23 there are no bad questions.

24 Q. Once again if you are hired to
25 value a company, would you factor in the number

105

1 of outstanding lawsuits or pending judgments
2 against that company?

3 A. I wouldn't factor them in, but the
4 company when they produce their reports should

5 factor that in, yes, sir. They should. As a
6 matter of fact, I think they are obliged, again
7 I don't want to play lawyer, but I think they
8 are obliged to list off their liabilities, real
9 or contingent or whatever you call them, but I
10 think you are supposed to do that in informing
11 the public.

12 Q. What liabilities are they obligated
13 to tell you about?

14 A. I don't know. I would assume all.
15 But I would ask a lawyer.

16 Q. Did you differentiate between real
17 and perceived?

18 A. I have issued shares of stock, I
19 have done that myself, and I know when I did
20 that, I have to list off all of my financial
21 obligations, including contingent liabilities.
22 I assume the same law would apply to the big
23 guys, not just the little guys.

24 Q. Do you know if a lawsuit, a pending
25 lawsuit is something that is required under

106

1 U.S. GAAP to be reported on the financial
2 statements?

3 A. I do not. But I would think in the
4 issue of just being open and honest and above
5 board, a company should list that on their
6 public statements.

7 Q. Stepping back, if you were
8 hypothetically engaged to put a value on a
9 privately held tobacco company, would you want
10 to know the number of pending product liability
11 lawsuits against it?

12 A. I think it is kind of the same
13 answer to the last question. I would think
14 that the company would inform me of that. I
15 don't think I have got the ability to go and
16 find that out independently, but the company --

17 Q. Maybe I'm not making myself clear.
18 Would you want to know that?

19 A. Oh, yes, I would want to know that.

20 Q. And that would weigh into your
21 evaluation process?

22 A. It is a tile in the mosaic. There
23 are maybe 10,000 tiles in the mosaic, that's
24 going to be one of them.

25 Q. Would the size of that tile --

107

1 A. The tiles are all the same size.

2 Q. So it is all the same size whether
3 you had one lawsuit or 10,000, the tile would
4 be one factor and you won't weight that?

5 A. No. If you have got a mosaic, the
6 tiles are usually the same thing. If there are
7 10,000 lawsuits, that may be 10,000 tiles, each
8 one representing a lawsuit.

9 Q. So you would weight that in the
10 judgment?

11 A. Yes.

12 Q. You would, in effect, discount the
13 evaluation or apply it as a discount factor?

14 A. I would consider it. I'm not sure
15 how I would handle it. I have never been faced

16 with that situation, but that would be
17 something to be considered. I think I would
18 probably need some legal help from somebody in
19 considering that, but those are tiles in the
20 mosaic and they should be considered.

21 And by the way, I assume in the
22 publicly traded company, the market has already
23 done that. The market knows that, and people
24 are still willing to buy and sell at whatever
25 price the market is. So the market does that

108

1 for you in the publicly traded corporation.

2 In the privately traded
3 corporation, you probably have to make an
4 adjustment of some kind.

5 Q. You would agree in a wholly owned
6 subsidiary or privately held corporation, the
7 market has not factored that into --

8 A. By the definition of being
9 privately held, it is not traded, so that's why
10 you have to make an adjustment. I don't have
11 to make that adjustment when I look at the
12 publicly held because the market does that for
13 me.

14 Q. If you are going to take -- this
15 can be done with a yes or no to my question --
16 would you say yes you have to factor --

17 A. Do me a favor --

18 MR. SMITH: Object to the form.

19 A. -- would you repeat the question so
20 I can answer the question yes or no, please.

21 Q. I think you answered it, but I was
22 a little unclear.

23 In valuing a company, privately
24 held tobacco corporation, you will want to
25 consider the number of lawsuits outstanding?

109

1 A. Yes. And if I could tack onto
2 that, that's not just for tobacco companies,
3 that's for any privately held company, you
4 would want to consider all liabilities,
5 including I think that would be a contingent
6 liability, and I think you ought to include
7 that.

8 Q. Would you also want to include the
9 number of judgments pending against it?

10 A. I would put that in the same
11 categories, yes, sir. As a matter of fact,
12 when you talk about lawsuits, I thought that's
13 what you meant.

14 Q. I apologize. When I talk about
15 lawsuits, I mean pending lawsuits. For
16 example, this case is pending against them,
17 there has been no judgment; then there are
18 cases that have gone to trial and judgments
19 have been rendered.

20 A. They are now on appeal or something
21 like that?

22 Q. Perhaps, or maybe not.

23 A. If they have been paid, it has
24 already been taken care of.

25 Q. Right. As of --

110

1 A. But, yes, that's something you
2 should consider. Another tile in the mosaic.
3 Q. As of the date that you did the May
4 18 report, were you aware of the number of
5 lawsuits pending against the defendant tobacco
6 companies?

7 A. No, sir. There has been no time in
8 my 64 years that I have been aware of the
9 number of lawsuits pending against any or all
10 tobacco companies. I have no idea.

11 Q. Were you aware of the number of
12 judgments outstanding against the defendant
13 tobacco companies?

14 A. No, sir. And I assume you mean the
15 moneys?

16 Q. Yes.

17 A. No idea, no, sir. Not something I
18 considered in my May 18 report. But the
19 marketplace has considered those.

20 Q. Have they considered it in the
21 privately held or the wholly owned subsidiaries
22 or in the parent companies?

23 A. They have considered it in the
24 parent companies, and the marketplace knows the
25 parent companies own the subsidiaries, so the

111

1 impact on the subsidiary is going to impact the
2 parent company. The market knows that.

3 Q. Do we know, is it a one-for-one
4 ratio, do we know that whatever discount factor
5 that was applied to the parent company, is that
6 amount applied directly to the subsidiaries?

7 A. It may be one to one, may be ten to
8 one, maybe one to 20.

9 Q. But we don't know the answer to
10 that?

11 A. I have no idea, but the marketplace
12 knows in its wisdom, the marketplace has taken
13 that into consideration, all the judgments,
14 pending lawsuits, the market has taken that
15 into consideration for the subsidiary and the
16 marketplace has taken that into consideration
17 for the parent.

18 Q. If you were asked to value the
19 tobacco company, you wouldn't have that wisdom
20 to apply it?

21 A. No, sir, I would not have that
22 wisdom. I would, therefore, have to make a
23 judgment, and my judgment may not be perfect.
24 It usually isn't.

25 Q. You mentioned earlier that you were

112

1 familiar with the attorney general lawsuits
2 against the tobacco companies, that you
3 actually participated in those?

4 A. Yes, sir. Harvey Rosen, my partner
5 in our firm, was the lead guy in the stuff that
6 our firm did, but I had some small amount, I
7 was a small cog.

8 Q. Are you familiar with what is
9 referred to as the Master Settlement Agreement
10 between the states and the defendant tobacco
11 companies?

12 A. Mostly from what I read in the
13 newspapers. I don't consider myself to be
14 knowledgeable on the subject. I just mention
15 that so you would be aware that we had played a
16 role. Harvey actually ended up testifying
17 before the United States Senate.

18 Q. As of May 18, at the time that you
19 prepared your report, did you know the annual
20 financial obligation of each of the defendant
21 tobacco companies under the terms of the Master
22 Settlement Agreement?

23 A. I probably knew that at some point
24 in time from having read the newspapers, but
25 not with any -- I didn't remember what it was.

113

1 I couldn't tell you who owes what to who or
2 what the obligations are.

3 Q. And once again you did not take
4 that into consideration when developing your
5 opinion for your May 18 report?

6 A. I did not, and I didn't have to.
7 The marketplace had already taken that into
8 consideration. That's the beauty of the
9 market. They had already put that into their
10 value of those shares.

11 Q. If you were asked to value the
12 defendant tobacco companies as of May 18, would
13 you have factored in the annual financial
14 obligation to the 46 settling states in
15 determining the value of the company?

16 A. I might. If I'm evaluating the
17 subsidiary?

18 Q. Yes.

19 A. I would need some help from an
20 attorney to figure out whose obligation it is.
21 Is it the obligation of the subsidiary or the
22 obligation of the parent. I don't know. But
23 it might not be the obligation of the
24 subsidiary. It might be the obligation of the
25 parent.

114

1 Q. But it would be a factor you would
2 consider?

3 A. It could be, but if it is the
4 obligation of the parent, then it is already in
5 the market valuation of the publicly traded
6 company.

7 Q. You noted earlier that generally
8 when you value a company, you would review
9 analysts' reports?

10 A. If available, yes, sir.

11 Q. Did you review any analysts'
12 reports in preparing your May 18?

13 A. I did not, because I didn't analyze
14 the companies. The marketplace had done it all
15 for me and done it for every analyst. Every
16 analyst will agree with me, the best way to
17 value a market company is the method I used.
18 There is no argument among economists on that.
19 It is one of the few areas we really all agree
20 on.

21 Q. But if you were to value a wholly
22 owned subsidiary, a tobacco company, you would

23 want to look at analysts' reports if they are
24 available?

25 A. If other people have taken a stab

115

1 at this, I would like to see it. As you said
2 earlier, more information is better than less
3 information in general.

4 Q. But you did not do that?

5 A. I did not do that, because that's
6 not what I was doing in the May 18 report.

7 Q. Next question, a little convoluted,
8 but if you were hired to value a company, would
9 you want to know what share of the industry
10 profits it has?

11 A. Sure. Another tile in the mosaic.

12 Q. Suffice it to say, you did not have
13 that information for the defendant tobacco
14 companies at the time you prepared your May 18
15 report?

16 A. Correct. That's not what the May
17 18 report addresses.

18 MR. SHIVELY: I would like to take
19 a break real quick and maybe hand over the
20 baton again.

21 (Recess taken.)

22 EXAMINATION OF JOHN F. BURKE, JR., Ph.D.

23 BY MR. FEIWUS:

24 A. You are?

25 Q. Dr. Burke, my name is Mr. Leonard

116

1 Feiwus from the Kasowitz firm, and I represent
2 Liggett.

3 A. Could you spell your last name.

4 Q. F E I W U S.

5 A. The answer on Jeopardy was nine V.
6 And the question was, "Mr. Wagner, do you
7 pronounce your name with a W? He said, "Nein,
8 V, Wagner."

9 Q. I see. That clarifies it.
10 Moving right along, I know it has
11 been a long morning. I'm going to restrict my
12 questions to the May 18, 2001 valuation report
13 that you submitted, Dr. Burke.

14 A. Yes, sir.

15 Q. Now, as of the May 18, 2001 report,
16 did you have an opinion as to the value of the
17 Liggett Group, Inc.?

18 A. The subsidiary?

19 Q. Yes.

20 A. I did not.

21 Q. And do you have an opinion as to
22 the value of Liggett Group, Inc. as of May 18,
23 2001?

24 A. I do not. If I did, I would have
25 put it in this piece of paper.

117

1 MR. SMITH: I object. I think he
2 said do you have an opinion.

3 MR. FEIWUS: I did say do you have
4 an opinion as of May 18, 2001.

5 Q. You stated earlier that you wanted
6 to amend one of your answers set forth in this
7 report. You mentioned that you wanted to amend

8 the present owner of -- present owner of
9 Liggett Tobacco from Brooke Group to some other
10 entity?

11 A. Yes, Vector Group Ltd.

12 Q. Do you have any other amendments
13 that you are seeking to make to this report?

14 A. No, sir.

15 Q. So then you do not have an opinion
16 that you will be offering at trial as to the
17 value of Liggett Group, Inc., the defendant in
18 this case?

19 A. As of May 18 or presently?

20 Q. Based on the May 18, 2001 report,
21 will you be offering an opinion at trial as to
22 the value of the Defendant Liggett Group, Inc.?

23 A. I did not express an opinion in the
24 May 18 letter of the value of the Liggett
25 Group. However, if the question is asked in

118

1 the present tense, then I do have an opinion as
2 of today, and I expressed that opinion as early
3 as June.

4 But as of May 18, I did not express
5 an opinion. You don't see one.

6 Q. I want to be very clear that I do
7 not want to open up this deposition to anything
8 concerning your June 11, 2001 report.

9 A. So would you phrase it in the past
10 tense then.

11 Q. I can rephrase the question. Based
12 on the methodology in the May 18, 2001 report,
13 will you be presenting at trial an opinion as
14 to the value of Liggett Group, Inc. in this
15 case?

16 A. If the question and the answer are
17 restricted to the May 18, 2001 report, I would
18 not be expressing an opinion because, as I say
19 in that report, undetermined. If asked a
20 different question and if I'm able to answer
21 it, I will do my best to answer it.

22 Q. Well, I want to know a few things
23 about the May 18, 2001 report and ask you -- I
24 want to focus your attention to the entity that
25 you referred to Liggett as Liggett Tobacco. Is

119

1 there any reason why you referred to the entity
2 as Liggett Tobacco as opposed to Liggett Group,
3 Inc.?

4 A. No.

5 Q. Were you aware of the fact when you
6 drafted the May 18, 2001 report that Liggett --
7 that the defendant in this case was Liggett
8 Group, Inc. and not Liggett Tobacco?

9 A. I don't remember that, no, sir.

10 Q. As of the May 18, 2001 report, did
11 you know that -- did you know the relationship
12 between the Liggett Group, Inc. and Brooke
13 Group Ltd.?

14 A. State that again.

15 Q. As of May 18, 2001, did you know
16 the relationship between Liggett Group, Inc.
17 and Brooke Group Ltd.?

18 A. A minute ago you asked me if I knew

19 that name of Liggett Group, Inc.
20 Q. As of May 18, 2001 when you drafted
21 this report, did you know the relationship
22 between the defendant in this case, Liggett
23 Group, Inc., and the entity Brooke Group Ltd.?
24 A. I did not. I called the entity
25 Liggett Tobacco, and so I knew the relationship

120

1 between Liggett Tobacco and Brooke Group.
2 Q. And what was that relationship?
3 A. I thought that Liggett Tobacco was
4 owned by Brooke Group, Inc.
5 Q. And what did you base that on?
6 A. One of those documents I got off
7 the internet.
8 Q. So based on documents that you got
9 off the internet --
10 A. I believe that's where that came
11 from. I don't believe that came from Russell
12 Smith. I believe it came from those kind of
13 documents, but I don't have the specific memory
14 of that, and the same would be true of Philip
15 Morris Companies and Philip Morris, Inc., and
16 if you say how did you know that and when did
17 you know it, I couldn't point you to a specific
18 time or date.
19 Q. So it was based on documents that
20 you obtained off of the internet?
21 A. I believe so.
22 Q. Did you endeavor to --
23 A. I don't have a specific memory of
24 pulling this document off and saying, ah-ha,
25 look at this.

121

1 Q. Do you know what documents you
2 reviewed off of the internet?
3 A. Not from memory. However, I
4 brought them with me.
5 Q. Well, we would ask for the
6 production of all of your work papers and
7 documents relating to -- they are all in the
8 boxes?
9 A. Yes.
10 Q. Are there any that are specific to
11 Liggett Group, Inc., Brooke Group or Vector?
12 A. Sure. It would be in those two
13 boxes.
14 Q. I'm not going to review them now,
15 but we would ask you to copy those and produce
16 those to us.
17 A. Not a problem as far as I'm
18 concerned. I assume you will foot the bill for
19 that?
20 Q. Yes.
21 A. I'll be happy to do that for you.
22 MR. SEXTON: I would like to join
23 in the request for whatever documents they are.
24 We will foot the bill.
25 A. Do you want me to just make 28

122

1 copies? How many copies do we need?
2 MR. SEXTON: Perhaps make one copy,
3 and you could send it to Ms. Chapman and she

4 will distribute them to us.
5 THE WITNESS: I'll make one copy
6 and send it to you, Diane.
7 MS. CHAPMAN: Thank you, Dr. Burke.
8 Q. You mentioned earlier in the
9 deposition that you have now learned that
10 Vector owns Liggett?
11 A. Yes, sir.
12 Q. And when did you come upon that
13 information?
14 A. I don't remember.
15 Q. Well, it was sometime after May 18,
16 2001?
17 A. Yes, it was after May 18.
18 Q. And what is your understanding of
19 the relationship between Liggett Group, Inc.
20 and Vector?
21 A. Vector is the parent. Liggett
22 Group is the subsidiary. Vector Group, I
23 understand, is a publicly traded entity.
24 Q. And what is the relationship
25 between Brooke Group and Liggett, your

123

1 understanding today?
2 A. It is my understanding, and I
3 didn't study this, that Brooke Group Ltd. owned
4 Liggett. Brooke Group eventually became
5 Vector.
6 Q. So your understanding is that today
7 Liggett Group, Inc. is owned by Vector and
8 there is no entity called Brooke Group?
9 A. No, I don't have an opinion on
10 that. I don't know if there also is an entity
11 out there floating around. I don't know if
12 that's a registered name or may exist in
13 England or Australia or Canada.
14 Q. But your understanding as you sit
15 here today is that Liggett Group, Inc. is owned
16 directly by Vector Group and that there are no
17 intermediary entities?
18 A. I don't have an understanding on
19 that. Maybe they are still owned by Brooke and
20 Brooke is owned by Vector, and maybe there is
21 28 other intermediaries in between there. I
22 don't have an understanding on that.
23 Q. What did you do to attempt to
24 assess -- just to be clear, as of the May 18,
25 2001 report, you don't have an opinion as to

124

1 Liggett's value?
2 A. You are correct.
3 Q. And you don't have an opinion as to
4 market capitalization of any of the Liggett
5 entities?
6 A. As of --
7 Q. May 18, 2001.
8 A. I do not --
9 Q. And what did you do --
10 A. -- I did not.
11 Q. What did you do to attempt to
12 assess Liggett's value for the May 18, 2001
13 report?
14 A. I tried to find out information

15 about the Brooke Group and I tried to find out
16 information about the Liggett Group. My quest
17 was not successful at that point in time.
18 Q. Did you ever request Liggett's
19 income statements? And when I say Liggett, I'm
20 referring to Liggett Group, Inc., the defendant
21 in this case.
22 A. Yes, sir.
23 Q. You did request that?
24 A. Yes, sir.
25 Q. And who did you make that request

125

1 of?
2 A. Mr. Russel Smith.
3 Q. And what was Mr. Russel Smith's
4 response?
5 A. I have no idea.
6 Q. He didn't respond to you when you
7 requested that information?
8 A. I just don't remember what his
9 response was. I don't know if he said, "I
10 don't have it, I couldn't get it."
11 Q. He didn't provide that information?
12 A. But I didn't have that information
13 as of May 18, and I'm not sure that was my
14 assignment at that point in time.
15 Q. What do you mean that wasn't your
16 assignment?
17 A. My assignment was to look at the
18 market value of the parent company.
19 Q. Well, isn't it true that your
20 assignment was to value the defendant entities
21 in this case?
22 A. I didn't hear the last part.
23 Q. Isn't it true that your assignment
24 was to assess the value of the defendant
25 entities in this case?

126

1 A. I don't know.
2 Q. It says here in your letter dated
3 May 18, 2001, "You have asked me to state an
4 opinion concerning the value of various tobacco
5 industry entities." Isn't it true that that
6 was your assignment?
7 A. Yes, sir.
8 Q. And you said earlier that would it
9 help you to assess the value of subsidiaries
10 that were not publicly traded if you had income
11 statements and balance statements and sales
12 information and the like of those specific
13 entities; isn't that true?
14 A. I did say that, and I'll repeat it
15 now.
16 Q. Okay. And my question is did you
17 endeavor to obtain that information for Liggett
18 Group, Inc.?
19 A. Yes, sir.
20 Q. And was that information provided
21 to you by Mr. Smith?
22 A. No, sir. Nor was I able to get it
23 on my own using my own resources.
24 Q. Have you obtained that information
25 since the May 18, 2001 report?

1 A. Yes, sir.
2 Q. Have you reviewed that information?
3 A. Yes, sir.
4 Q. And has that information assisted
5 you in assessing an opinion of value after the
6 May 18, 2001 report?
7 A. Yes, sir.
8 Q. Would you agree that Vector owns
9 entities and assets that have nothing to do
10 with cigarette smoking or tobacco?
11 A. Probably, but I don't know that as
12 I sit here.
13 Q. Have you reviewed the 10K for
14 Vector dated April 2, 2001?
15 A. I don't remember if I reviewed that
16 or not.
17 Q. Have you reviewed any of the 10Ks
18 or 10Qs of Vector?
19 A. I believe I have, yes, sir.
20 Q. So then isn't it true that those
21 10Ks and 10Qs may claim that Vector owns
22 entities and assets that have nothing to do
23 with cigarette smoking or tobacco?
24 A. They may, I just don't remember.
25 I'm not disagreeing with you.

1 Q. If it were true that Vector owned
2 entities and assets that have nothing to do
3 with cigarette smoking or tobacco, then
4 wouldn't it be true that the market cap of
5 Vector would not be the same as the value of
6 Liggett?
7 A. Yes, sir.
8 Q. Isn't it true that Vector's value
9 would be greater than the value of Liggett?
10 A. You don't know until you analyze
11 it.
12 Q. Well, if I told you that Vector
13 owns entities and assets that have nothing to
14 do with cigarette smoking or tobacco and that
15 those assets are in the black, you know what
16 that means, right?
17 A. I do.
18 Q. Then it is also true that Vector's
19 value which includes Liggett and these other
20 entities would be greater than those of
21 Liggett?
22 A. Possibly. It all depends on how
23 far in the black are they. I mean if you have
24 got a company in the black but it is only
25 returning one-tenth of 1 percent on invested

1 capital, that's not a very good deal.
2 Q. I understand, but that would still
3 mean that Vector would be worth more than
4 Liggett, wouldn't it?
5 A. I don't think so.
6 Q. And why not?
7 A. Because if you have a company that
8 is made up of five operating entities and all
9 five are in the black and four of them are
10 making a penny a year, which puts them in the

11 black, but that's not very profitable.
12 Q. If Vector owned --
13 A. It is possible.
14 Q. It is possible. If Vector owned
15 significant assets and entities other than
16 Liggett, wouldn't it be true that -- excuse me.
17 Let me repeat that.
18 If Vector owned significant assets
19 or entities other than Liggett, wouldn't it be
20 true that Vector's market capitalization would
21 be greater than Liggett's value?
22 A. I would suspect that would be the
23 case, yes, sir.
24 Q. And it would also be true that
25 Vector's market capitalization would be greater

130

1 than Liggett's ability to pay a specific
2 judgment?
3 A. Repeat that one again.
4 Q. It would be true that Vector's
5 market values -- I'm sorry.
6 If Vector owned assets and entities
7 other than Liggett that were significantly in
8 the black, it would be true that Vector's
9 market capitalization would be greater than
10 Liggett's ability to pay a judgment?
11 A. There are a few too many variables
12 in that sentence for my simple mind to follow.
13 Q. Let me see if I can break it down
14 for you. For purposes of your May 18, 2001
15 report, you proffered -- I'm sorry, you offered
16 the opinion as to the market value of parent
17 companies in an effort to value their
18 subsidiaries?
19 A. With the exception of Liggett, and
20 I didn't say that was the value of the
21 subsidiary. I said this is the value of the
22 parent.
23 Q. That's exactly the point I want to
24 make. So if you had assessed Vector's market
25 value in the May 18, 2001 report, which you

131

1 didn't, but if you had done that, then that
2 would not be coterminous with the value of
3 Liggett as of that day?
4 A. Correct. The value of Liggett may
5 be the same or may be greater or may be
6 smaller, depending upon the profitability of
7 the parent and its other subsidiaries and
8 Liggett.
9 Q. And if Vector owned substantial
10 assets or entities other than Liggett, you
11 would assume that Vector's value would be
12 greater than Liggett in the May 18, 2001
13 report?
14 A. It very well could be, but as I
15 said before, it is going to depend on the
16 profitability and these other entities. It is
17 possible to have an entity that is making a 20
18 percent return whereas in the whole company the
19 return is only 10 percent. That would mean the
20 subsidiary stands alone, could be worth more.
21 Q. What would you need to make that

22 determination?

23 A. You would need to know information
24 about the parent, sales, costs, operating
25 profits, you would need to know the same

132

1 information about the subsidiary, sales, cost,
2 operating profits. You would have to know what
3 portion of the parent's operating profits does
4 this company contribute.

5 To make up an example, it is
6 possible that the parent makes 10 million in
7 profits, and this subsidiary makes 50 million,
8 but the other entities that the parent owns
9 take a loss, that's how you get from 50 million
10 in this company to only 10 million in the
11 parent company because they lost 40 million in
12 other entities.

13 Q. If the other entities were
14 operating substantially at a profit, then would
15 your conclusion be the same?

16 A. No.

17 Q. What would your conclusion be?

18 A. Let's assume they all make the
19 same, just to make it easy on me, they all make
20 the same percentage profit, 10, 20, 30 percent,
21 whatever it is. Then I would say that the
22 subsidiary is proportional. So if they are all
23 making the same rate and the parent company is
24 worth \$100 million capitalized value of its
25 stock, then if this subsidiary is one-tenth,

133

1 then I would say that this subsidiary is worth
2 ten million.

3 You set up a ratio and look at the
4 proportional. What portion of operating
5 profits does the subsidiary contribute to the
6 parent.

7 Q. That's assuming that all of the
8 operating profits are the same for all of the
9 entities?

10 A. That's how I set up my example. So
11 we have now gone through two sides, we have
12 gone through the side that everybody
13 contributes the same, we have also gone through
14 the side that the other contributes less, and
15 the third possibility is the other contribute
16 more.

17 Q. So if the operating profits of the
18 other entities were greater in proportion to
19 that of Liggett, I will assume that Liggett's
20 value would be much less than that of Vector?

21 A. Yes, sir.

22 Q. You testified earlier that the
23 value of the tobacco companies is generally
24 lower or discounted due to a litigation risk
25 than other companies, conventional companies?

134

1 A. Well, no. Well, I assume
2 conventional companies aren't tobacco
3 companies. If you look just at tobacco
4 litigation, that is going to effect tobacco
5 companies and not affect an automobile company.
6 You are not going to discount an automobile

7 company because they brought a suit against a
8 tobacco company.

9 Q. So if Vector owned companies that
10 had nothing to do with tobacco or smoking,
11 those other entities would not necessarily have
12 a litigation risk attributable to them; would
13 they not?

14 A. Not necessarily, but they may have
15 their own risks.

16 Q. That's right. But --

17 A. And they are what they are.

18 Q. I understand that, but in terms of
19 assessing how much litigation risk from the
20 tobacco company?

21 A. Then you would only look at tobacco
22 companies.

23 Q. You don't have any -- you haven't
24 performed or reviewed any analysis or any data
25 concerning how much of the litigation risk

135

1 attributable to Liggett is attributable to
2 Vector?

3 A. Correct. And I didn't have the
4 market data, so the market didn't do it for me
5 either at this point in time, May 18.

6 Q. Just so we are clear, prior to May
7 18, 2001, you never performed a market
8 capitalization analysis of Vector, Brooke or
9 Liggett?

10 A. Correct.

11 Q. And prior to May 18, 2001, you
12 never performed any market valuation of any
13 entity related to the defendant in this case,
14 Liggett Group, Inc.?

15 A. Correct.

16 Q. And prior to May 18, 2001, you
17 never performed an evaluation of any entity
18 related to the defendant Liggett Group, Inc.?

19 A. None that I was willing to publish
20 and state as an opinion, correct.

21 Q. Prior to May 18, 2001, you didn't
22 review any income statements, balance sheets,
23 sales information, revenue information, profit
24 or losses related to any entity related to the
25 defendant Liggett Group, Inc.?

136

1 A. I might have had that information,
2 but I didn't have sufficient information to do
3 the job that I was assigned on May 18.

4 Q. Prior to May 18, 2001, you didn't
5 perform any analysis concerning the defendant
6 Liggett Group, Inc.'s ability to pay any amount
7 of money without limitations on a judgment that
8 would be rendered in this case?

9 A. I don't think I have ever done that
10 for any company at any time related to this
11 case.

12 Q. And that includes the defendant
13 Liggett Group, Inc., any of the defendants in
14 this case, any of the entities related to
15 Liggett Group?

16 A. I never stated an opinion in any of
17 the reports that I produced, and I don't have

18 an opinion here today on the ability to pay a
19 judgment of any of these companies. I know how
20 to do that, but I have not been requested to do
21 that and I have not done that.
22 Q. Just give me a moment.
23 A. Sure.
24 Q. Thank you, Dr. Burke.
25 A. Okay.

137

1 Q. I just want to state something that
2 I said earlier: Liggett Group, Inc., and I
3 think the co-defendants say the same, we
4 reserve the right to continue the deposition
5 and ask you further questions if for whatever
6 reason issues concerning the June 11, 2001
7 valuation are raised at any time in this
8 action.
9 A. Fine by me, certainly, yes, sir.
10 MR. SEXTON: Let's take another
11 break.
12 (Recess taken.)
13 MR. JENNINGS: Doctor, thank you.
14 Dr. Burke, we have no further questions.
15 THE WITNESS: Tell me your name,
16 please.
17 MR. JENNINGS: Colin Jennings. And
18 by my calculation, we have two hours and 18
19 minutes of testimony. If the Court revisits
20 the scope of your permissible testimony, we
21 will hereby reserve the right to reopen your
22 deposition to inquire on those new opinions.
23 THE WITNESS: That would be fine.
24 MR. SHIVELY: American Tobacco
25 wants to adopt that.

138

1 MR. SEXTON: And the documents that
2 we expect to be disclosed.
3 MR. SMITH: I will put on the
4 record that while I don't think that we have
5 tried to dwell on time, at least I don't think
6 I have in these depositions, I think we started at
7 9:20 and it is now 1:00. And I think there was
8 significant amount of time included in huddles.
9 So I don't know what huddles count for, but I
10 just wanted to indicate that they weren't
11 huddles of ours.
12 THE WITNESS: I think I left my
13 office at 10 minutes of 9:00 to get here.
14 MR. SMITH: I think we started at
15 9:20, in fairness.
16 THE WITNESS: On the handle of my
17 office, there is a meter, that went off at 10
18 minutes to 9:00. It is probably going to take
19 me 15 or 20 minutes to get back there.
20 MR. SEXTON: Do you want the right
21 to read and sign?
22 MR. SMITH: I think that's up to
23 Dr. Burke.
24 THE WITNESS: Do you have a
25 recommendation?

139

1 MS. CHAPMAN: Our reporter is very
2 excellent.

3 THE WITNESS: I always ask the
4 question, "Did you do a good job?" And I
5 always get the same answer to that question.
6 MR. SMITH: I'll follow that lead.
7 THE WITNESS: I will waive.
8

9 (Deposition concluded at 1:01 p.m.)
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140

1 CERTIFICATE

2 The State of Ohio,)
3 SS:
4 County of Cuyahoga.)
5

6 I, Wendy L. Klauss, a Notary Public
7 within and for the State of Ohio, duly
8 commissioned and qualified, do hereby certify
9 that the within named witness, JOHN F. BURKE,
10 JR., Ph.D., was by me first duly sworn to
11 testify the truth, the whole truth and nothing
12 but the truth in the cause aforesaid; that the
13 testimony then given by the above-referenced
14 witness was by me reduced to stenotypy in the
15 presence of said witness; afterwards
16 transcribed, and that the foregoing is a true
17 and correct transcription of the testimony so
18 given by the above-referenced witness.

19 I do further certify that this
20 deposition was taken at the time and place in
21 the foregoing caption specified and was
22 completed without adjournment.
23
24
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141

1 I do further certify that I am not
2 a relative, counsel or attorney for either
3 party, or otherwise interested in the event of
4 this action.

5 IN WITNESS WHEREOF, I have hereunto
6 set my hand and affixed my seal of office at
7 Cleveland, Ohio, on this day of
8 , 2001.
9
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13

14 Wendy L. Klauss, Notary Public
15 within and for the State of Ohio
16

17 My commission expires July 14, 2004.
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142

I N D E X

1
2
3 EXAMINATION OF JOHN F. BURKE, JR., Ph.D.
4 BY MR. SEXTON..... 6:11
5
6 EXAMINATION OF JOHN F. BURKE, JR., Ph.D.
7 BY MR. SHIVELY..... 86:20
8
9 EXAMINATION OF JOHN F. BURKE, JR., Ph.D.
10 BY MR. FEIWUS..... 115:22
11
12 Exhibit 1 was marked..... 6:3
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143

SIGNATURE OF WITNESS

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6 The Deposition of JOHN F. BURKE, JR.,
7 Ph.D., taken in the matter, on the date, and at
8 the time and place set out on the title page
9 hereof.

10 It was requested that the deposition be
11 taken by the reporter and that same be reduced
12 to typewritten form.

13 It was agreed by and between counsel and
14 the parties that the reading and signing of the
15 transcript of said deposition, be and the same
16 is hereby waived.
17